NEW

COMMENTARIES

ON

THE LAWS OF ENGLAND.

(PARTLY FOUNDED ON BLACKSTONE.)

BY

HENRY JOHN STEPHEN,
SERJEANT AT LAW.

"*For hoping well to deliver myself from mistaking, by the order and perspicuous expressing 'of that I do propound, I am otherwise zealous and affectionate to recede as little from 'antiquity, either in terms or opinions, as may stand with truth, and the proficience of know-'ledge.*"—Lord Bac. Adv. of Learning.

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BOOK V.

OF CIVIL INJURIES—(*continued*).

CHAPTER XIII.

OF CIVIL INJURIES COGNIZABLE IN THE ECCLESIASTICAL, MILITARY AND MARITIME COURTS—WITH THEIR REMEDIES.

HAVING now examined in detail the civil injuries cognizable at common law, with their several remedies, our attention must next be turned to such wrongs and remedies as appertain to the courts ecclesiastical, military, and maritime (*a*).

With regard to these, our course will be not so much to consider [what hath at any time been claimed or pretended to belong to their jurisdiction, by the officers and judges of those respective courts; but what the common law allows and considers to be of that character.

For these eccentrical tribunals (which are principally guided by the rules of the imperial and canon laws), as

(*a*) As to these courts, vide sup. bk. v. c. v.

[they subsist, and are admitted in England, not by any right of their own (*b*), but upon bare sufferance and toleration from the municipal law, must have recourse to that law, to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed, or drawn in question before them.] Except as far as this adoption by the municipal law extends, it [matters not, what the Pandects of Justinian, or the Decretals of Gregory, have ordained. They are here of no more intrinsic authority than the laws of Solon and Lycurgus. The common law of England is the one uniform rule to determine the jurisdiction of our courts: and, if any tribunals whatsoever attempt to exceed the limits so prescribed them, the superior courts of common law may, and do, prohibit them (*c*); and in some cases punish their judges (*d*).]

Having premised this general caution, we proceed now to consider the wrongs or injuries which are cognizable by these several courts; and—

I. Those cognizable by the Ecclesiastical courts.] By which are to be understood only such as are made the subject of proceeding in these courts, for the purpose of making an injured party [satisfaction and redress for the damage which he has sustained]; as we do not mean to take specific notice of any proceeding there for reformation of the offender, and *pro salute animæ* (*e*) And these will be reduced under the following heads:—

(*b*) Vide sup. vol. I. pp. 8, 62.

(*c*) As to prohibition to the ecclesiastical courts, see Ex parte Tucker, In re Inman, 1 Man. & G. 519; Tucker *v.* Inman, 4 Man. & G. 1049. As to prohibition generally, vide sup. bk. v. c. XII.

(*d*) Hale, Hist. C. L. c. 2.

(*e*) The offences proceeded against *pro salute animæ*, are those "committed by the clergy themselves, "such as neglect of duty, immoral "conduct, advancing doctrines not "conformable to the Articles of the "Church, suffering dilapidations, "and the like offences;—also by "laymen, such as brawling, laying "violent hands, and other irreverent conduct in the church or "churchyard, violating churchyards, "neglecting to repair ecclesiastical "buildings, incest, incontinence.... "These offences are punished by "monition, penance, excommunica-

[First, the *subtraction* (or withholding) *of tithes* (*f*) from the parson or vicar, whether the former be a clergyman or a lay appropriator (*g*). But herein a distinction must be taken: for the ecclesiastical courts have no jurisdiction to try the *right* of tithes unless between spiritual persons (*h*); but in ordinary cases, between spiritual men and lay men, are only to compel the payment of them, when the right is not disputed (*i*). By the statute (or rather writ (*k*)) of *circumspectè agatis* (*l*), it is declared, that the court christian shall not be prohibited from holding plea, "*si rector petat versus parochianos, oblationes et decimas debitas et consuetas* (*m*):" so that if any dispute arises whether such tithes be *due* and *accustomed*, this cannot be determined in the ecclesiastical court, but before the courts of the common law; as such questions affect the temporal inheritance, and the determination must bind the real property. But where the *right* does not come into question, but only the *fact* whether or no the tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury for which the remedy may properly be had in the spiritual court; viz. the recovery of the tithes, or their

"tion, suspension *ab ingressu ecclesiæ*, suspension from office, and "deprivation." (Report of Commissioners on Ecclesiastical Courts, dated 15th February, 1832, p. 13.) We may notice here, that these courts formerly entertained suits for *defamation* (Ibid.), in the case where the spiritual offence of incontinency was wrongfully imputed. (Ibid. Et vide Evans *v.* Gwyn, 5 Q. B. 844.) But by 18 & 19 Vict. c. 41, their jurisdiction in this matter was abolished. And proceedings in the ecclesiastical courts for incontinency itself, have in modern times been out of use.

(*f*) As to tithes, vide sup. vol. III. p. 78.

(*g*) Stat. 32 Hen. 8, c. 7.

(*h*) 2 Roll. Abr. 309, 310; Bro. Abr. tit. Jurisdiction, 85.

(*i*) 2 Inst. 364, 389, 490.

(*k*) See Barrington, 120; 3 Pryn. Rec. 336.

(*l*) 13 Edw. 1, st. 4.

(*m*) In Ruffhead's edition of the Statutes at Large it is stated, that the words following in italics (though inserted in his text) are not in the original of the statute of *circumspectè agatis*. "If a parson demand *of his "parishioners, oblations or tithes due "and accustomed*." Neither do they occur in the subsequent *Articuli cleri*, (made 9 Edw. 2, st. 1,) which also contain enactments as to when a prohibition to the spiritual courts will lie, in reference to the subject of tithes.

[equivalent. By statute 2 & 3 Edw. VI. c. 13, it is enacted, that if any person shall carry off his predial tithes (viz. of corn, hay, or the like), before the tenth part is duly set forth, or agreement is made with the proprietor, or shall willingly withdraw his tithes of the same, or shall stop or hinder the proprietor of the tithes or his deputy, from viewing or carrying them away; such offender shall pay *double* the value of the tithes, with costs, to be recovered before the ecclesiastical judge, according to the ecclesiastical laws. By a former clause of the same statute, the *treble* value of the tithes, so subtracted or withheld, may be sued for in the temporal courts, which is equivalent to the double value to be sued for in the ecclesiastical. For one may sue for and recover in the ecclesiastical courts the tithes themselves, or a recompense for them, by the antient law: to which the suit for the *double* value is superadded by the statute. But as no suit lay in the temporal courts for the subtraction of tithes themselves, therefore the statute gave a *treble* forfeiture, if sued for there, in order to make the course of justice uniform, by giving the same reparation in one court as in the other (*n*).] However, it has of late seldom happened that tithes have been sued for in the spiritual court; [for if the defendant pleads any custom, *modus*, composition, or other matters whereby the right of tithing is called into question, this takes it out of the jurisdiction of the ecclesiastical judges; for the law will not suffer the existence of such a right to be decided by the sentence of any single,—much less an ecclesiastical—judge, without the verdict of a jury.] A summary method, besides, of recovering tithes not exceeding the value of 10*l.* (or, where due from Quakers, 50*l.*), is given by statute 53 Geo. III. c. 127, (amending some former statutes on the same subject,) by complaint to two justices of the peace; and by 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, no remedy is now allowed either in

(*n*) 2 Inst. 250. As to the action for treble value of the tithes, see Graburn *v.* Brown, 16 Mee. & W. 821.

the superior or in the ecclesiastical courts for recovery of tithes; unless the amount claimed exceed 10*l.* (or in the case of Quakers, 50*l.*), or unless the title to the tithes be *bonâ fide* brought into question (*o*). Besides all which, it is to be recollected that the claim itself to tithes has now become comparatively rare—that species of property having been, in the great majority of parishes, already commuted into a corn rent-charge under the Tithe Commutation Act, of which an account was given in a former volume (*p*).

[Another injury, cognizable in the spiritual courts, is the *non-payment of other ecclesiastical dues* to the clergy; as pensions, mortuaries, compositions, offerings, and whatsoever falls under the denomination of *surplice-fees*, for ministerial offices of the Church: all which injuries are redressed by a decree for their actual payment.] But, by the several statutes just mentioned, the same provisions that are made with respect to tithes of small amount, and those claimed from Quakers, are extended to oblations and all ecclesiastical dues and demands whatsoever.

A suit, moreover, will lie in these Courts for *fees due to their officers*; but not where the *right* to them is disputed, for then it must be decided by the common law (*q*).

These Courts also have cognizance of *spoliation*; which [is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any right thereunto, but under a pretended title. It is remedied by a decree to account for the profits so taken. This injury, when the *jus patronatûs* or right of advowson doth not come into debate, is cognizable in the spiritual court: as if a patron first presents A. to a benefice, who is instituted and inducted thereto; and then, upon pretence of a vacancy, *the same* patron presents B. to the same living, and he also obtains institution and induction. Now, if the fact of the vacancy be disputed, then that clerk who is kept

(*o*) See Peyton *v.* Watson, 3 Q. B. 658; Robinson *v.* Purday, 16 Mee. & W. 11.

(*p*) Vide sup. vol. III. p. 90.

(*q*) 1 Ventr. 165.

[out of the profits of the living, whichever it be, may sue the other in the spiritual court for spoliation, or taking the profits of his benefice. And it shall there be tried, whether the living were, or were not, vacant; upon which the validity of the second clerk's pretensions must depend (r). But if the right of patronage comes at all into dispute, as if one patron presented A. and another patron presented B., there the ecclesiastical court hath no cognizance, provided the tithes sued for amount to a fourth part of the value of the living, but may be prohibited, at the instance of the patron, by the writ of *indicavit* (s). So, also, if a clerk, without any colour of title, ejects another from his parsonage, this injury must be redressed in the temporal courts; for it depends upon no question determinable by the spiritual law, (as plurality of benefices or no plurality, vacancy or no vacancy,) but is merely a civil injury.]

Another case in which these courts have jurisdiction, is that of [*dilapidations*, which are a kind of ecclesiastical waste; either voluntary, by pulling down; or permissive, by suffering the chancel, parsonage-house, and other buildings thereunto belonging, to decay. Here an action lies either in the spiritual court, by the canon law; or in the courts of common law (t): and it may be brought by the successor against the predecessor, if living, or, if dead, then against his executors (u).] Also, [by statute 13 Eliz. c. 10 (x), if any spiritual person makes over or alienates his goods, with intent to defeat his successors of their remedy for dilapidations, the successor shall have such remedy against the alienee, in the ecclesiastical court, as if he were the executor of his predecessor.]

The spiritual courts have also cognizance as to [the *neglect of reparations of the church, churchyard, and the like* (y);] and a suit may be brought therein for *non-pay-*

(r) F. N. B. 36.

(s) Circumspectè agatis, 13 Edw. 1, st. 4; Artic. Cleri, 9 Edw. 2, c. 2; F. N. B. 45.

(t) Jones v. Hill, Cart. 224; S. C. 3 Lev. 268.

(u) Vide sup. vol. III. pp. 66, 103.

(x) See also 14 Eliz. c. 11, s. 18.

(y) Circumspectè agatis, 5 Rep. 66; and see the Report of Commis-

ment of a church-rate (z). But by 53 Geo. III. c. 127, 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, if the rate does not exceed 10*l*., or in the case of Quakers, 50*l*, and its validity is not disputed, the remedy is to be before two justices of the peace, and the ecclesiastical court can exercise no jurisdiction.

Again, these courts have jurisdiction in all suits respecting *pews and seats* in the body of the church (*a*); but where a pew is claimed by prescription, and the right is disputed, a court of common law will, by writ of prohibition, prevent the ecclesiastical court from proceeding farther; in order that the prescription may be tried by a jury (*b*).

[And these are the principal injuries which are cognizable, or for which suits may be instituted, in ecclesiastical courts.]

But it has been already shown in former places, that these courts have up to a very recent period exercised two other provinces of a much more extensive nature, viz., those relating to matters *testamentary* and matters *matrimonial*, of which they have only just been deprived by the statutes 20 & 21 Vict. cc. 77, 85. And as it is at the same time directed by these statutes, that except as otherwise provided, adherence shall still be made as far as practicable to the principles and practice applied to these matters in the ecclesiastical courts (*c*), we deem it expedient to give some account of the law hitherto prevalent there, in regard to them.

1. [Testamentary causes, or those relating to wills and intestacies, were originally cognizable in the king's courts of

sioners on Ecclesiastical Courts, dated 15 Feb., 1832, p. 51.

(z) 3 Bl. Com. p. 92.

(*a*) Report of Commissioners on Ecclesiastical Courts, 15 Feb., 1832, p. 49. (See Mainwaring *v.* Giles, 5 Barn. & Ald. 361.) As to seats and pews in the *chancel*, see the same Report, et sup. vol. III. p. 68.

(*b*) See the same Report, et sup. vol. III. p. 69.

(*c*) 20 & 21 Vict. c. 77, s. 29; c. 85, s. 22.

[common law, viz. the antient county courts (*d*); and were afterwards transferred to the jurisdiction of the Church, in the manner already described in a former volume (*e*).

This spiritual jurisdiction of testamentary causes was a peculiar constitution of this island; for in almost all other, (even in popish,) countries, all matters testamentary are under the jurisdiction of the civil magistrate (*f*). And that this privilege was enjoyed by the clergy in England, not as a matter of ecclesiastical right, but by the special favour and indulgence of the municipal law, and, as it should seem, by some public act of the great council, is freely acknowledged by Lindewode, the ablest canonist of the fifteenth century. Testamentary causes, he observes, belong to the ecclesiastical courts "*de consuetudine Angliæ, et super consensu regis et suorum procerum in talibus ab antiquo concesso*" (*g*). The same was, about a century before, very openly professed in a canon of Archbishop Stratford, viz. that the administration of intestates' goods was "*ab olim*" granted to the ordinary, "*consensu regis et magnatum regni Angliæ*" (*h*). The constitutions of Cardinal Othobon also testify, that this provision "*olim a prælatis, cum approbatione regis et baronum dicitur emanasse*" (*i*). And Archbishop Parker (*k*) in Queen Elizabeth's time, affirms in express words, that originally, in matters testamentary, "*non ullam habebant episcopi authoritatem, præter eam quam a rege acceptam referebant. Jus testamenta probandi non habebant; administrationis potestatem cuique delegare non poterant.*"

At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascer-

(*d*) Hickes' Disser. Epistolar. pp. 8, 58.

(*e*) Vide sup. vol. II. pp. 195, 196.

(*f*) The attempts of the clergy to assume jurisdiction over them on the continent is stated by Blackstone to have been curbed by the edict of the Emperor Justin (Cod. 1, 3, 41), who assigns this reason:—"*Absurdum etenim clericis est, immo etiam opprobriosum, si peritos se velint ostendere disceptationum esse forensium.*"

(*g*) Provincial. l. 3, t. 13, fol. 176.

(*h*) Ibid. l. 3, t. 38, fol. 263.

(*i*) Cap. 23.

(*k*) See 9 Rep. 38.

[tained by any antient writer; and Lindewode (*l*) very fairly confesses, "*cujus regis temporibus hoc ordinatum sit, non reperio.*" We find it indeed frequently asserted in our common law-books, that it is but of *late years* that the Church hath had the probate of wills (*m*).] But this must only be understood to mean, that it had not *always* had this prerogative; for certainly it was of very high antiquity. [Lindewode, we have seen, declares that it was "*ab antiquo;*" Stratford, in the reign of King Edward the third, mentions it as "*ab olim ordinatum;*" and Cardinal Othobon, in the fifty-second year of Henry the third, speaks of it as an antient tradition. Bracton holds it for clear law in the same reign of Henry the third, that matters testamentary belonged to the spiritual court (*n*). And, yet earlier, the disposition of intestates' goods "*per visum ecclesiæ*" was one of the articles confirmed to the prelates by King John's *Magna Charta* (*o*). Matthew Paris also informs us, that King Richard the first ordained in Normandy, "*quod distributio rerum quæ in testamento relinquuntur, auctoritate ecclesiæ fiet.*" And even this ordinance of King Richard, was only an introduction of the same law into his ducal dominions, which before prevailed in this kingdom: for in the reign of his father Henry the second, Glanvil is express, that "*si quis aliquid dixerit contra testamentum, placitum illud in curia christianitatis audiri debet et terminari*" (*p*). And the Scots book called *Regiam Majestatem* agrees *verbatim* with Glanvil in this point (*q*).]

The jurisdiction of the ecclesiastical courts under this head, comprised both the probate of wills and the granting of administrations. When no opposition was made, the probate or administration was granted [merely *ex officio et debito justitiæ;*] and was then the object of what was called [the *voluntary*, and not the *contentious* jurisdiction.] But when a *caveat* was entered against proving the will, or

(*l*) Fol. 263.

(*m*) Fitz. Abr. tit. Testament, pl. 4; 2 Roll. Abr. 217; 9 Rep. 37; Vaugh. 207.

(*n*) L. 5, De Exceptionibus, c. 10.

(*o*) Capt. 27, edit. Oxon.

(*p*) L. 7, c. 8.

(*q*) L. 2, c. 38.

granting administration, and a suit thereupon followed to determine either the validity of the testament, or who had a right to administer; this claim and obstruction by the adverse party, were [an injury to the party entitled; and as such were remedied by the sentence of the spiritual court, either by establishing the will, or granting the administration (r).]

2. [Matrimonial causes, or those respecting the rights of marriage, seem not, if we consider marriages in the light of mere civil contracts, to be properly of spiritual cognizance (s). But the Romanists having very early converted this contract into a holy sacramental ordinance, the Church of course took it under her protection, upon the division of the two jurisdictions. And, in the hands of such able politicians, it soon became an engine of great importance to the papal scheme of an universal monarchy over Christendom. The numberless canonical impediments that were invented, and occasionally dispensed with, by the holy see, not only enriched the coffers of the Church, but gave it a vast ascendant over princes of all denominations; whose marriages were sanctified or reprobated, their issue legitimated or bastardized, and the succession to their thrones established or rendered precarious, according to the humour or interest of the reigning pontiff: besides a thousand nice and difficult scruples, with which the clergy of those ages puzzled the understandings and loaded the consciences of the inferior orders of the laity; and which could only be unravelled and removed by these

(r) As a consequential part of testamentary jurisdiction, the ecclesiastical courts had also cognizance of *legacies*, and the *distribution of residues of intestates' estates*. But in these cases the courts of equity had a concurrent, and have now the sole, jurisdiction, (except where the claim is of small amount, so as to admit the interference of the county courts); for by 20 & 21 Vict. c. 77, s. 23, such cases cannot now be entertained in the ecclesiastical courts; nor can they be entertained in the new Court of Probate. In general, too, these cases have been always foreign to the jurisdiction of the superior courts of the common law. (Vide sup. vol. II. p. 225.)

(s) Warb. Alliance, 173.

[their spiritual guides. Yet, abstracted from this universal influence, which affords so good a reason for their conduct, one might otherwise be led to wonder, that the same authority which enjoined the strictest celibacy to the priesthood should think them the proper judges in causes between man and wife. These causes, indeed, partly from the nature of the injuries complained of, and partly from the method of treating them,] among the Roman ecclesiastics (*t*), [soon became too gross for the modesty of a lay tribunal.] Causes matrimonial, however, became so peculiarly ecclesiastical, that the temporal courts would never interfere in controversies of this kind, unless in some particular cases. As, if the spiritual court proceeded to call a marriage in question, upon grounds that rendered it merely voidable, after the death of either of the parties (*u*); this the courts of common law would prohibit, because it tended to bastardize and disinherit the issue (*x*), who could not so well defend the marriage as the parties themselves, when both of them were living, might have done (*y*).

Of matrimonial causes, one was, 1. *Causa jactitationis matrimonii*; when one of the parties boasted (*z*) or gave out that he or she was married to the other, whereby a common reputation of their matrimony might ensue. On this ground the party injured might libel the other, in the spiritual court; and, unless the defendant made out and undertook a proof of the actual marriage, he or she was enjoined perpetual silence upon that head; which was the only remedy the ecclesiastical courts could give for this injury. 2. The suit for *restitution of conjugal rights*, was also another species of matrimonial causes; which was brought whenever either the husband or wife was guilty of the injury of subtraction, or lived separate from the other

(*t*) Some of the impurest books that are extant in any language, are those written by the popish clergy on the subjects of matrimony and divorce.

(*u*) Vide sup. vol. II. p. 250.

(*x*) 3 Bl. Com. p. 93.

(*y*) 2 Inst. 614.

(*z*) See Lord Hawke *v.* Corri, 2 Hagg. 220.

without any sufficient reason; in which case the ecclesiastical jurisdiction would compel them to come together again, if either party were weak enough to desire it contrary to the inclination of the other. 3. *Divorces* also were causes thoroughly matrimonial, and cognizable by the ecclesiastical judge. Where it became improper, through some supervenient cause arising *ex post facto*, that the parties should live together any longer, for this the ecclesiastical law administered the remedy of separation, or a divorce *a mensâ et thoro*. But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio*, in this case the law decreed not only a separation from bed and board, but *a vinculo matrimonii* itself. 4. The last species of matrimonial causes was a consequence drawn from one of the species of divorce (that *a mensâ et thoro*), which was the suit for *alimony*, that is, for a reasonable allowance to the wife for her support out of the husband's estate (*a*).

We have now adverted to the principal injuries for which the party grieved is either now, or has hitherto been, entitled to find a remedy in the ecclesiastical courts. [But before we entirely dismiss this head, it may not be improper to add a short account of the *method of proceeding* in these tribunals, with regard to the redress of injuries.]

[The proceedings in the ecclesiastical courts are regulated according to the practice of the civil and canon laws; or rather according to a mixture of both, corrected and new modelled by their own particular usages, and the interposition of the courts of common law (*b*). For if the proceedings in the spiritual court be ever so regularly consonant to the rules of the Roman law, yet if they be mani-

(*a*) The account above given of the several matrimonial causes is from 3 Bl. Com. pp. 93, 94. In addition to these causes, there was formerly another, viz., the suit to *compel the celebration of a marriage*, in pursuance of a contract to that effect. But this was abolished by 26 Geo. 2, c. 33, and 4 Geo. 4, c. 76, s. 27.

(*b*) Vide sup. vol. I. p. 61—68.

[festly repugnant to the fundamental maxims of the municipal laws, to which upon principles of sound policy the ecclesiastical process ought in every State to conform (*c*), (as if they require two witnesses to prove a fact, where one will suffice at common law,) in such cases a prohibition will be awarded against them (*d*).] The proceedings are conducted by *Advocates* and *Proctors*, who answer to *Barristers* and *Attornies* respectively, in the common law courts; and no advocate is admissible who has not taken the degree of doctor of laws at an English university (*e*).

The ordinary course of the practice is, first,—[by *citation*, to call the party injuring before them. Then by *libel*, (*libellus*, a little book,) or by articles drawn out in a formal *allegation*, to set forth the complainant's ground of complaint. To this succeeds the *defendant's answer* upon oath (*f*), when, if he denies or extenuates the charge, they proceed to *proofs*. If the defendant has any circumstances to offer in his defence, he must also propound them in what is called his *defensive allegation*, to which he is entitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist.] And by the new enactment of 17 & 18 Vict. c. 47, the court may summon witnesses, and examine them, or cause them to be examined, by word of mouth, and either before or after examination by deposition or affidavit; and notes of

(*c*) Warb. Alliance, 179.

(*d*) 2 Roll. Ab. 300, 302.

(*e*) There is a college of "Doctors of Law exercent in the Ecclesiastical and Admiralty Courts;" the site of which college, as well as of the courts, is called Doctors' Commons. By 20 & 21 Vict. c. 77, ss. 116, 117, the college is empowered to dispose of its real and personal estate, and to surrender its charter of incorporation.

(*f*) In former times, when a clergyman was cited to appear before the bishop or ecclesiastical court for alleged misconduct, he might be required to make answer to it, on the oath of himself and his compurgators, that is, a certain number of his neighbours able to swear that they believed him innocent of the charge. This oath, *ex officio*, (as it was called,) was prohibited generally to laymen (12 Rep. 26); but was continued, as regarded the clergy, till the middle of the seventeenth century, when it was abolished by 13 Car. 2, c. 12. (Report of Commissioners on Ecclesiastical Courts, 15 Feb., 1832, p. 55.)

such evidence shall be taken down in writing by the judge, or registrar, or such other person and in such manner as the judge shall direct (*g*). [When all the pleadings and proofs are concluded, they are referred to the consideration of a single judge, who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definitive sentence* at his own discretion: from which there generally lies an *appeal* in the several stages mentioned in a former chapter (*h*).]

The ecclesiastical courts have power to pronounce, among other sentences, that of *excommunication;* such sentences being pronounced as a spiritual censure for offences falling under ecclesiastical cognizance: and [this is described to be twofold; the less and the greater. The less excommunication is an ecclesiastical censure, excluding the party from the participation of the sacraments: the greater proceeds farther; and excludes him not only from these, but also from the company of all Christians.] Formerly, too, and until the passing of the Act to be presently mentioned, [an excommunicated man was disabled to do any act, that was required to be done by a *probus et legalis homo.* He could not serve upon juries; could not be a witness in any court; and, what was worst of all, could not bring an action, either real or personal, to recover lands or money due to him.] In this state of things it was the practice of the ecclesiastical courts to avail themselves of the weapon of excommunication, in order to enforce their sentences and orders in general. For where any of these were disobeyed, the court excommunicated

(*g*) It may be observed, that by 17 & 18 Vict. c. 125, s. 20, any person called as a witness, or required or desiring to make an affidavit or deposition, who shall refuse or be unwilling to be sworn from conscientious motives, may make *affirmation* instead. By sect. 103, this section of the Common Law Procedure Act, 1854, is extended to "every court "of civil judicature in England and "Ireland."

(*h*) Vide sup. vol. III. p. 424. See 6 & 7 Vict. c. 38, s. 15, and 7 & 8 Vict. c. 69, s. 9, giving the Judicial Committee of the Privy Council power to regulate the practice and mode of proceeding in all appeals from ecclesiastical courts.

the disobedient party; by which not only did he become subject to the consequences above described, but the general law of England stepped in besides, to the court's assistance,—permitting the bishop to certify the contempt to the sovereign in Chancery, and issuing thereon a writ to the sheriff of the county, [called, from the bishop's certificate, a *significavit*, or, from its effects, a writ *de excommunicato capiendo*,]—under which the sheriff was to take the offender and imprison him in the county gaol until he was reconciled to the Church. But by 53 Geo. III. c. 127, it is now provided, that no person pronounced excommunicated shall incur thereby any civil penalty or incapacity whatever, save such imprisonment, not exceeding six months, as the ecclesiastical court shall direct; and that such sentence shall be signified to the sovereign in Chancery, and thereupon enforced by a writ *de excommunicato capiendo*. And, by the same Act, excommunication, as for contempt, is in effect abolished; and in lieu thereof, where a lawful citation or sentence has not been obeyed, or contempt in face of the court has been committed, the judge shall have power to pronounce such persons contumacious and in contempt; and, after a certain period, to signify the same to the sovereign in Chancery: whereupon a writ *de contumace capiendo* (*i*) shall issue from that court; which shall have the same force and effect as formerly belonged, in case of contempt, to a writ *de excommunicato capiendo* (*j*).

II. We are [next to consider the injuries, cognizable in the *court military*, or court of *chivalry*,] held before the earl marshal (*k*). [The jurisdiction of which it is declared by statute 13 Ric. II. c. 2, to be this: "That it hath "cognizance of contracts touching deeds of arms or of

(*i*) See R. *v.* Rickets, 6 A. & E. 537; R. *v.* Baines, 12 Ad. & E. 210.

(*j*) By 2 & 3 Will. 4, c. 93, provisions are made for enforcing obedience to the decrees of the ecclesiastical courts of England and Ireland; and by 3 & 4 Vict. c. 93, further regulations are made for the release of persons committed to gaol under the writ *de contumace capiendo*.

(*k*) As to this court, vide sup. vol. III. p. 428.

[" war out of the realm; and also of things which touch " war within the realm, which cannot be determined or dis- " cussed by the common law: together with other usages " and customs to the same matters appertaining." So that wherever the common law can give redress, this court hath no jurisdiction; which has thrown it entirely out of use as to the matter of contracts,—all such being usually cognizable in the courts of Westminster Hall.

The words "other usages and customs" support the claim of this court, 1. To give relief to such of the nobility and gentry as think themselves aggrieved in matters of honour: and 2. To keep up the distinction of degrees and quality. Whence it follows that the civil jurisdiction of this court of chivalry is principally in two points: the redressing injuries of honour; and correcting encroachments in matters of coat-armour, precedency, and other distinctions of families.

As a court of honour, it is to give satisfaction to all such as are aggrieved in that point; a point of a nature so nice and delicate, that its wrongs and injuries escape the notice of the common law; and yet are fit to be redressed somewhere. Such, for instance, as calling a man coward, or giving him the lie; for which, as they are productive of no immediate danger to his person or property, no action will lie in the courts of Westminster:] and amends was, by the common law, appointed to be given in the court of chivalry (*l*). [Modern resolutions however have determined, that how much soever such a jurisdiction may be expedient, yet no action for words will at present lie therein (*m*). And it hath always been most clearly holden (*n*), that, as this court cannot meddle with any thing determinable by the common law, it therefore can give no pecuniary satisfaction or damages; inasmuch as the quantity and determination thereof is ever of common law cognizance. And therefore

(*l*) Year Book, 37 Hen. 6, 21; Selden, of Duels, c. 10; Hal. Hist. C. L. 37.

(*m*) Chambers *v.* Sir J. Jennings, Salk. 553; S. C. 7 Mod. 125; 2 Hawk. P. C. 4.

(*n*) Hal. Hist. C. L. 37.

[this court of chivalry can at most only order reparation in point of honour; as, to compel the defendant *mendacium sibi ipsi imponere*, or to take the lie that he has given upon himself, or to make such other submission as the laws of honour may require (*o*). Neither can this court, as to the point of reparation in honour, hold plea of any such word, or thing, wherein the party is relievable by the courts of common law. As if a man gives another a blow, or calls him thief or murderer; for in both these cases the common law has pointed out his proper remedy by action.

As to the other point of its civil jurisdiction, the redressing of encroachments and usurpations in matters of heraldry and coat-armour,—it is the business of this court, according to Sir Matthew Hale, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c., and also rights of place or precedence, where the king's patent, or act of parliament, (which cannot be overruled by this court,) have not already determined it.

The proceedings in this court, are by petition, in a summary way; and the trial is not by a jury of twelve men, but by witnesses or by combat (*p*). But as it cannot imprison, (not being a court of record); and as by the resolutions of the superior courts it is now confined to so narrow and restrained a jurisdiction; it has fallen into contempt and disuse. The marshalling of coat-armour, which was formerly the pride and study of all the best families in the kingdom, is now greatly disregarded: and has fallen into the hands of certain officers and attendants upon this court, called heralds,] whose testimony as to descent is no longer of the same weight as formerly, nor even

(*o*) 1 Roll. Ab. 128.

(*p*) This mode of trial also obtained in the now extinct action of a writ of right, and the now extinct appeal for murder, and other offences; but was expressly abolished as to these, by 59 Geo. 3, c. 46; and in the preamble of that statute it is recited, that "the trial by battel in *any* suit is a mode of trial unfit to be used, and that it is expedient that the same should be wholly abolished."

in general admissible in a court of justice. [But their original visitation books,—compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them upon oath, —are allowed to be good evidence of pedigrees (*q*).

III. Injuries cognizable by the courts maritime, (or admiralty courts,) are the next object of our inquiries. These courts have jurisdiction and power to try and determine all maritime causes; or such injuries which, though they are in their nature of common law cognizance, yet, being committed on the high seas out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own (*r*).] Generally speaking, therefore, and with the exception of any case otherwise specially provided for by act of parliament, [all admiralty causes must be causes arising wholly upon the sea, and not within the precincts of any county. For the statute 13 Ric. II. c. 5, directs that the admiral and his deputy shall not meddle with any thing, but only things done upon the sea; and the statute 15 Ric. II. c. 3, declares that the court of the admiral hath no manner of cognizance of any contract or of any other thing done within the body of any county (*s*), either by land or by water; nor of any wreck of the sea, for that must be cast on land before it becomes a wreck (*t*). But it is otherwise of things *flotsam*,

(*q*) Matthews *v.* Port, Comb. 63; Taylor on Evidence, 2nd ed. p. 1358. Blackstone expresses an opinion that it would be desirable that this practice of visitation at certain periods were revived: for, as he remarks, the failure of inquisitions *post mortem*, by the abolition of military tenures, combined with the negligence of the heralds in omitting their usual progresses, has rendered the proof of a modern descent, for the recovery of an estate or succession to a title of honour, more difficult than that of an antient descent. (3 Bl. Com. 106.)

(*r*) See also the account given sup. vol. III. p. 429, of the jurisdiction of the judge of the admiralty.

(*s*) As to what is *infra corpus comitatus*, see Com. Dig. Admiralty (E. 14); Jac. Law Dict. "Admiral."

(*t*) As to *wreck*, vide sup. vol. II. p. 547. It is provided, however, by the statute 17 & 18 Vict. c. 104,

[*jetsam* and *ligan*; for over them the admiral hath jurisdiction, as they are in and upon the sea (*u*). If part of any contract, (or other cause of action,) doth arise upon the sea, and part upon the land, the common law excludes the Admiralty Court from its jurisdiction; for, part belonging properly to one cognizance, and part to another, the common or general law takes place of the particular (*v*). Therefore, though pure maritime acquisitions, which are earned and become due on the high seas—as seamen's wages—are one proper object of the admiralty jurisdiction, even though the contract for them be made upon land (*x*); yet in general, if there be a contract made in England, and to be executed upon the seas—as a charter-party or covenant that a ship shall sail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England,—as a bond made on shipboard to pay money in London, or the like; these kinds of mixed contracts belong not to the admiralty jurisdiction; but to the courts of common law (*y*).] It is to be observed, however, that [where the Admiralty Court hath jurisdiction of the original subject-matter in the cause, it hath also jurisdiction of all consequential questions, though properly determinable at common law (*z*). Wherefore, among other reasons, a suit for beaconage of a beacon standing on a rock in the sea, may be brought in the Court

ss. 460, 464, 468, 476, 492—498, that the Court of Admiralty shall, in certain cases, have jurisdiction on claims of *salvage*, (as to which, vide sup. vol. II. p. 550); and by sect. 476, that such jurisdiction shall attach, whether the salvage service was performed at sea, or by land, or partly at sea and partly by land. See also as to salvage, 3 & 4 Vict. c. 65; 13 & 14 Vict. c. 26; 15 & 16 Vict. c. 131, s. 39.

(*u*) Vide sup. vol. II. p. 549.

(*v*) Co. Litt. 261.

(*x*) 1 Vent. 146. Seamen's wages, however, under 50*l*. cannot in general be sued for in an admiralty court; but are to be recovered before two justices of the peace (17 & 18 Vict. c. 104, ss 188, 189).

(*y*) See Bridgeman's case, Hob. 23; Hale, Hist. C. L. 35; Le Caux *v*. Eden, Doug. 572.

(*z*) 13 Rep. 53; Ridley *v*. Egglesfield, 2 Lev. 25; Hardr. 183.

[of Admiralty; the admiral having an original jurisdiction over beacons (*a*).]

In addition to his general jurisdiction over maritime causes, it must be recollected that the judge of the Admiralty has a special commission from the Crown, to adjudicate on *prize of war*, and sometimes has to decide on *booty of war* (*b*).

[The proceedings of the Courts of Admiralty bear much resemblance to those of the civil law, but are not entirely founded thereon; and they likewise adopt and make use of other laws, as occasion requires;—such as the Rhodian laws, and the laws of Oleron (*c*). For the law of England, as has frequently been observed, doth not acknowledge or pay any deference to the civil law considered as such; but merely permits its use in such cases where it judges its determinations equitable; and therefore blends it, in the present instance, with other marine laws; the whole being corrected, altered and amended by acts of parliament and common usage; so that out of this composition a body of jurisprudence is extracted, which owes its authority only to its reception here by consent of the crown and people. The first process in these courts, is frequently by arrest of the defendant's person (*d*): and they also take recognizances or stipulation of certain *fidejussors* in the nature of bail (*e*); and in cases of default may imprison both them and their principal (*f*). They may also fine and imprison for a contempt in the face of the court (*g*). And all this is supported by immemorial usage; grounded on the necessity of supporting a jurisdiction so extensive (*h*); though opposite to the usual doctrines of the common law,—these

(*a*) Crosse *v.* Digges, 1 Sid. 158.

(*b*) Vide sup. vol. III. p. 429.

(*c*) Hale, Hist. C. L. 36; Co. Litt. 11.

(*d*) Clerke, Prax. Cur. Ad. s. 13.

(*e*) Ibid. s. 11; 1 Roll. Abr. 531; Par *v.* Evans, Raym. 78; Degrave *v.* Hedges, Ld. Raym. 1286.

(*f*) 1 Roll. Abr. 531; God. 193, 260.

(*g*) Sparks *v.* Martyn, 1 Ventr. 1.

(*h*) Pane *v.* Evans, 1 Keb. 552.

[being no courts of record, because in general their process is much conformed to that of the civil law (*i*).]

Such in a general point of view is the nature of the jurisdiction and practice of the High Court of Admiralty (*k*); but it will be proper before we conclude to advert particularly to the specific regulations which have been recently introduced in reference to this subject, by certain acts of recent date.

First, by 3 & 4 Vict. c. 65, it is provided, among other things, as follows:—

1. That the Dean of Arches shall be assistant to and be competent to sit for the judge of the High Court of Admiralty, in all suits and proceedings in the said court: and that the advocates, surrogates and proctors of the Court of Arches, shall be competent to practise in the Court of Admiralty.

2. That whenever any ship shall be under arrest by process issuing from the High Court of Admiralty,—or the proceeds of any ship having been so arrested shall have been brought into the Registry of the same court,—the court shall have jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship; and to decide any suit instituted by any such person, in respect of any such claims or causes of action respectively.

3. That in all suits the court may summon before it and examine witnesses by word of mouth; and either before or after examination by deposition, or before a commissioner appointed by the court; and notes of such evidence shall be taken down by the judge or registrar or such other person as the court may direct.

4. That it shall be lawful for a judge, or such commissioner, to require the attendance of any witnesses, and the production of any deeds and other writings, by writ in the nature of *subpœna*, or *subpœna duces tecum*, as

(*i*) Bro. Abr. tit. Error, 177.

(*k*) As to the *criminal* jurisdiction of the Admiralty Court, vide post, book VI. c. XIV.

used in her Majesty's Court of Queen's Bench at Westminster.

5. That in any contested suit, the Court of Admiralty shall have power to direct a trial, by jury, of an issue on any question of fact; and that the substance of such issue shall be specified by the judge at the time of directing the same; and, in case of dispute, the form of it shall be settled by him; and the trial thereon shall be had before some judge of the superior courts of common law, at the sittings at *nisi prius*, or before some judge of assize; and a new trial may afterwards be granted on application of any of the parties within three calendar months: and further, that the power of granting or refusing such issue or new trial may be matter of appeal to her Majesty in council.

6. That it shall be lawful for the judge of the Court of Admiralty, (subject to the approbation of her Majesty in council,) from time to time to make rules and orders respecting the practice of such court, and the conduct and duties of the officers and practitioners therein; and to repeal or alter the same.

7. That no action shall lie against such judge, for error in judgment; and that he shall have all the privileges and protection which appertain to the judges of the superior courts of common law.

8. That the keeper of every common gaol shall be bound to receive and take into his custody, all persons who shall be committed thereunto, by the Court of Admiralty, or by any coroner of the Admiralty.

9. That the judge shall have power to discharge any person in custody for contempt of the said court, for any cause, other than the non-payment of money.

10. That the said court shall have jurisdiction to decide all questions concerning booty of war, or the distribution thereof, which it shall please her Majesty to refer to the judge of the said court, by the advice of her Privy Council, to be dealt with as in cases of prize of war.

It is also by 13 & 14 Vict. c. 26, among other things

provided, that, whenever any of the ships of war of her Majesty, or the East India Company, or their officers and crews respectively, shall attack persons alleged to be pirates afloat or ashore,—the High Court of Admiralty, or any court of Vice-Admiralty in her Majesty's dominions beyond the seas, may determine whether that was the real character of the persons attacked:—that all ships and goods taken from pirates by such ships, or officers and crews, may be proceeded against in any of such courts, and be liable to condemnation as droits and perquisites of her Majesty in her office of Admiralty;—but that if any part of the property shall be duly proved to have been taken from her Majesty's subjects, or the subjects of any foreign power, the same shall be restored to the former owner, on paying in lieu of salvage, a sum of money equal to one-eighth part of the true value, to be distributed among the recaptors as the Act directs (*l*).

(*l*) See also 13 & 14 Vict. c. 27, amending this Act as to the time of its taking effect. Since these statutes, there have been also passed the 17 & 18 Vict. c. 19, as to the jurisdiction and proceedings of this court in cases of prize, bounty, and salvage distributable among the officers and crews of ships of war; and 17 & 18 Vict. c. 78 (The Admiralty Court Act, 1854), "to appoint persons to administer oaths, and to "substitute stamps in lieu of fees, "and for other purposes, in the High "Court of Admiralty of England."

CHAPTER XIV.

OF CIVIL INJURIES COGNIZABLE IN THE COURTS OF EQUITY—WITH THEIR REMEDIES.



Before we enter on the subject of the ensuing chapter, viz. the civil injuries cognizable in the courts of equity, with their appropriate remedies (*a*), it will be proper to recollect the observations made in a former part of this work on the nature of equity (*b*). Its nature has been there generally explained, and it has been shown to constitute a large and important portion of our juridical system —distinct from and suppletory to the common law, and administered in its own peculiar courts. But it may be important now to enter into some further particulars, tending to throw more distinct light on this subject.

[The very terms of a court of *equity*, and a court of *law*, as contrasted to each other, are apt to confound and mislead us; as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which would draw a line between the two jurisdictions, by setting law and equity in opposition to each other,—will be found either totally erroneous, or erroneous to a certain degree.

1. Thus, in the first place, it is said (*c*), that it is the business of a court of equity, in England, to abate the rigour of the common law.] And in fact there have been some few instances of its exercising this kind of interposition. But, in general, [no such power is contended for. Hard

(*a*) As to the distribution of civil injuries, vide sup. vol. III. p. 114.

(*b*) Vide sup. vol. I. p. 81.

(*c*) Lord Kaims, Prin. of Eq 44.

[was the case of bond creditors, whose debtor devised away his real estate. Rigorous and unjust the rule which put the devisee in a better position than the heir (*d*). Yet a court of equity had no power to interpose.] Hard also were the rules of the common law (so lately subsisting), [that land descended or devised should not be liable to the simple contract debts of the ancestor or devisor (*e*),—although the money was laid out in purchasing the very land: that the father should never immediately succeed as heir to the real estate of his son (*f*):] and that lands should descend [to a remote relation of the whole blood,—or even escheat to the lord,—in preference to the owner's half brother (*g*).] And yet no relief from any of these severities,—though the artificial reasons for them, arising from feudal principles, had long ago entirely ceased,—could ever be afforded by a court of equity; and it is to the legislature alone that we owe our deliverance from them (*h*). [In all such cases of positive law, the courts of equity, as well as the courts of law, must say with Ulpian (*i*), "*Hoc quidem perquam durum est, sed ita lex scripta est.*"

2. It is said (*k*), that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound and equally profess to interpret statutes according to the true intent of the legislature. In general law, all cases cannot be foreseen; or, if foreseen, cannot be expressed: some will arise that

(*d*) Vide sup. vol. I. pp. 425, 426.

(*e*) Ibid. p. 427.

(*f*) Ibid. p. 406.

(*g*) Ibid. p. 417.

(*h*) To these instances Blackstone adds the case of *parol demurrer*; a practice according to which an infant, (when made defendant in many real actions, or in an action of debt brought against him as heir to a deceased ancestor,) might formerly pray that the parol might demur, viz. that the pleadings might be stayed till he should attain his full age. Against this also, no relief could be afforded by equity; but the practice itself was abolished by 11 Geo. 4 & 1 Will. 4, c. 47, s. 10.

(*i*) Ff. 40, 9, 12.

(*k*) Lord Kaims, Prin. of Equity, 177.

[will fall within the meaning, though not within the words of the legislator; and others, which may fall within the letter, may be contrary to its meaning, though not expressly excepted.] In reference to such considerations as these, a case, (as we elsewhere had occasion to remark,) is sometimes said to fall within the *equity*,—or, at other times, to be *out* of the equity,—of an act of parliament (*l*). But [here by equity we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special or otherwise inaccurate or defective. These, then, are the cases which, as Grotius (*m*) says, "*lex non exactè definit, sed arbitrio boni viri permittit,*" in order to find out the true sense and meaning of the lawgiver from every other topic of construction. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges, in the courts both of law and equity; the construction must in both be the same; or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense, in a single tittle.

3. Again, it hath been said (*n*), that *fraud, accident* and *trust* are the proper and peculiar objects of a court of equity. But every kind of fraud is equally cognizable, and equally adverted to, in a court of law.] In like manner [many *accidents* are also supplied in a court of law;—as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths, (which make it impossible to perform a condition literally,) and a multitude of other contingencies: and many cannot be relieved even in a court of equity: as] the accident of [a devise ill executed,] or a power of leasing omitted in a family settlement. [A technical *trust*, indeed, created in land by the limitation of a second use, was forced into the

(*l*) Vide sup. vol. I. p. 75.

(*m*) De Æquit. s. 3.

(*n*) 1 Roll. Abr. 374; 4 Inst. 84, Earl of Bath *v.* Sherwin, 10 Mod. 1.

[courts of equity in the manner formerly mentioned (*o*); and this species of trust has ever since remained as a kind of *peculium* in those courts; which also exercise in general an exclusive jurisdiction over trusts of *personal* property. But there are some trusts which are cognizable in a court of law: as deposits and all manner of bailments (*p*), and especially that implied contract, (so highly beneficial and useful,) of having undertaken to account for money received to another's use; which is the ground of an action on the case, almost as universally remedial as a bill in equity.

4. Once more; it hath been said that a court of equity is not bound by rules or precedents; but acts from the opinion of the judge (*q*), founded on the circumstances of every particular case: whereas the system of our courts of equity is a laboured connected system, governed by established rules; and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus the refusing a wife her dower in a trust estate, and yet allowing the husband his curtesy (*r*);] which was formerly the rule of a court of equity, though such estate is now subject to the former as well as to the latter incident, by the provision of a recent act of parliament (*s*);—and [the distinguishing between a mortgage at *five per cent.*, with a clause of reduction to *four*, if the interest be regularly paid, and a mortgage at *four per cent.*, with a clause of enlargement to *five*, if the payment of the interest be deferred: so that the former

(*o*) Vide sup. vol. I. p. 370.

(*p*) Vide sup. vol. II. p. 78.

(*q*) This is stated by Mr. Selden (Table Talk, tit. Equity), with more pleasantry than truth: "For *law* we have a measure, and know what to trust to; *equity* is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. It is all one, as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience."

(*r*) Vide sup. vol. I. p. 376; Milner *v.* Colmer, 2 P. Wms. 610.

(*s*) 3 & 4 Will. 4, c. 105.

[shall be deemed a conscientious, the latter an unrighteous bargain (*t*):—both these and other cases that might be instanced are plainly rules of positive law; which have been supported only by the reverence shown, (and generally very properly shown,) to a series of former determinations, in order that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed in the courts of equity, that a particular judgment, founded upon special circumstances, gives rise to a general rule (*u*).]

It is true that the notion just mentioned, of the character, power and practice of a court of equity, was [formerly adopted and propagated (though not with approbation of the thing), by our principal antiquaries and lawyers,—by Spelman, Coke, Lambard and Selden, and even the great Bacon himself (*x*). But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves,—partly from their ignorance of law (being frequently bishops or statesmen), partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law,—had arrogated to themselves such unlimited authority, as hath been totally disclaimed by their successors,] since the close of the seventeenth century. [The decrees of a court of equity, were then rather in the nature of awards, formed on the sudden, *pro re natâ*, with more probity of intention than knowledge of the subject,—founded on no settled principles, as being never designed and therefore never used as precedents.] But the systems of jurisprudence in our courts, both of law and equity, are now equally fixed or positive systems; though [varied by different usages in the forms and mode of their proceedings;

(*t*) Holles *v.* Wyse, 2 Vern. 289; Strode *v.* Parker, ib. 316; Nicholls *v.* Maynard, 3 Atk. 520.

(*u*) See the case of Foster and Munt, 1 Vern. 473, with regard to the undisposed *residuum* of personal estates.

(*x*) Vide Archeion, 71, 72, 73; De Augm. Scient. l. 8, c. 3; Table Talk, tit. Equity; Gloss. 108.

[the one being originally derived, (though much reformed and improved,) from the feudal customs as they prevailed in different ages in the Saxon and Norman judicatures (*y*); the other, (but with equal improvements,) from the imperial and pontifical formularies introduced by their clerical chancellors.]

Subject to this difference in the form of procedure, these systems are also in strict accordance with each other, as to the principles on which they proceed; the maxim generally applicable to the subject being, that *equity follows the law*. Some few instances indeed exist,—where a manifestly harsh and unreasonable rule having been maintained in the common law courts, owing to a want of proper liberality and expansion in the views of the judges, relief has been afforded from it in the courts of equity. [Thus the penalty of a bond, originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money, was therefore very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan, with interest; for the judges could not, as the law then stood, give judgment that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary companion of commerce (*z*),—nay, after the statute of 37 Henry VIII. c. 9, had declared the debt or loan itself to be "the just and true intent" for which the obligation was given, their narrowminded successors still adhered wilfully and technically to the letter of the antient precedents; and refused to consider the payment of principal, interest and costs as a full satisfaction of the bond. At the same time more liberal men, who sat in the courts of equity, construed the instrument according to its "just and true intent," as merely a security for the loan; in which light it was certainly understood by the parties; at least after these deter-

(*y*) Vide sup. vol. I. p. 45.

(*z*) Vide sup. vol. II. p. 87.

[minations; and therefore this construction should have been universally received. So, in mortgages, being only a landed, as the other is a personal, security for the money lent, the payment of principal, interest and costs ought at any time, before judgment executed, to have saved the forfeiture in a court of law, as well as in a court of equity. And the inconvenience, as well as injustice, of putting different constructions in different courts, upon one and the same transaction, obliged the parliament at length to interfere: and to direct by the statutes 4 Anne, c. 16, and 7 Geo. II. c. 20, that, in cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be universally followed in the courts of law, wherein it had before these statutes in some degree obtained a footing (*a*).]

But notwithstanding these particular exceptions, the maxim that equity follows the law has been long fully recognized; so that the rules of property, the rules of evidence, and the rules of interpretation, are, or ought to be, the same under both systems. Thus [neither a court of equity, nor of law, can vary men's wills or agreements; or, (in other words,) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages,—as a rent of 5*l.* an acre for ploughing up antient meadow (*b*); nor against a lapse of time where the time is material to the contract,—as in covenants for renewal of leases. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement.] And upon the same principle, [where

(*a*) See Stern *v.* Vanburgh, 2 Keb. 553, 555; Elliott *v.* Callow, Salk. 597; Anonym. 6 Mod. 11; Burridge *v.* Fortescue, ib. 60; Ireland's case, ib. 101.

(*b*) Aylett *v.* Dodd, 2 Atk. 239.

[the subject matter is such as requires to be determined *secundum æquum et bonum*, as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of positive right, both courts must submit to and follow those antient and invariable maxims, "*quæ relicta sunt et tradita*" (c). Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question depends upon that law; as in the case of the privileges of ambassadors. In mercantile transactions they follow the marine law, and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum*; in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law (*d*), according to the nature of the subject; and if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country, and would both decide accordingly (*e*).

Such, then, being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist?] It principally consists in the difference of the subjects over which they exercise jurisdiction; in the kind of relief they administer; and the method of proceeding they observe (*f*).

I. And, first, as to the subjects of jurisdiction. The jurisdiction in equity having been originally introduced, as elsewhere shown (*g*), to mitigate certain severities, and to supply certain defects, existing in the common law, and from which relief could not otherwise be obtained, it is

(c) "*De jure naturæ, cogitare per nos atque dicere debemus; de jure populi Romani, quæ relicta sunt et tradita.*"—Cic. de Leg. 1, 3, *ad calc.*

(*d*) Vide vol. I. p. 64.

(*e*) See Phil. on Ev. vol. ii. p. 144.

(*f*) See Wykham *v.* Wykham, 18 Ves. jun. 415; Clarke *v.* Parker, 19 Ves. jun. 21, 22.

(*g*) Vide sup. vol. I. p. 81.

consequently to be considered as in the nature of a supplement only, (however valuable and extensive,) to the proper and antient scheme of judicature. There are accordingly many subjects which, having been always sufficiently provided for by the common law, remain under its exclusive cognizance, undisturbed by any interference of the courts of equity; some few on the other hand, of which no notice has ever been taken by the courts of law, and which are therefore exclusively dealt with by the courts of equity; and many others over which the two jurisdictions hold a sort of *divisum imperium*, justice being administered to the suitor at common law, in reference to those subjects, but in a limited or imperfect manner, and so as to require the occasional interposition of a court of equity, in order to insure to the suitor the full means and measure of redress (*i*). Of the first class of subjects it will be sufficient to say, in general, that it comprises all those not falling under the second and third. To the second class belong the right of redemption in a forfeited mortgage, and the beneficiary interest under trust (*k*); to the third, the subjects of accounts, partnerships, and agreements, with many others, of which a distinct idea cannot well be obtained without consulting the treatises on Chancery Practice (*l*). Of this class of subjects, however, it may be in general observed, that, though all in some measure belonging in common to the co-ordinate jurisdiction of law and equity, they are in some instances distributed between them in very unequal shares. Thus, though the subject of agreement may be said to be indifferently appropriate to either forum, the dominion over accounts, and by conse-

(*i*) It is to be observed, however, that a plaintiff is not allowed to sue both at law and in equity for the same thing; if he does, the court of equity will put him to his election; though an exception to this is admitted in the case of a mortgagee, who is entitled to proceed both in law and equity. (See Dan. Pr. (3d edit.), p. 654; Smith's Pr. (6th edit.), p. 777.)

(*k*) Vide sup. vol. I. p. 369.

(*l*) See particularly Spence, on the Equitable Jurisdiction of the Court of Chancery, and Daniell's Pract. of the Court of Chancery (3d edit.), by Headlam.

quence over partnerships also, is almost entirely engrossed by the courts of equity.

II. As to the kinds of relief. We shall here particularly notice four kinds of relief which are afforded by a court of equity, namely, 1st, where it protects and enforces the execution of trusts; 2ndly, where it enforces the specific performance of contracts; 3rdly, where it grants an injunction; 4thly, where it lends its aid to perpetuate testimony.

1. The origin and nature of *trusts* have been considered under a former division of this work (*m*). In the present place it will be sufficient to remark, that, for their protection and enforcement, no means are in general afforded by the courts of common law: but that proceedings may be taken in equity, praying such relief from the court as the circumstances of the case require; such as that of compelling the trustee to account for trust money received; or compelling a sale of the trust property, and a due application of the proceeds under the direction of the court; or setting aside dispositions of trust property made in breach of trust, and with knowledge of the trust, on the part of the purchaser as well as the trustee; or appointing new trustees, either in substitution for or in addition to the existing ones (*n*).

In connection with the subject of trusts, may be also noticed the proceedings in a court of equity, for the *administration of assets* (*o*): involving the payment of debts

(*m*) Vide sup. vol. I. p. 354, et seq.

(*n*) The following statutes have been latterly passed for relief of trustees; the enlargement of their powers; and the removal of inconvenience, arising from their disability to act in certain cases:—43 Geo. 3, c. 75; 59 Geo. 3, c. 80, s. 2; 6 Geo. 4, c. 74; 9 Geo. 4, c. 78; 11 Geo. 4 & 1 Will. 4, c. 65; 3 & 4 Will. 4, c. 74, ss. 33, 91; 8 & 9 Vict. c. 97, s. 3, c. 118, ss. 20, 137; 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74; 13 & 14 Vict. c. 35, ss. 19—25; c. 60; 15 & 16 Vict. c. 56; 16 & 17 Vict. c. 70, s. 108, et seq.; 18 & 19 Vict. c. 13; c. 91, s. 10; 19 & 20 Vict. c. 120, ss. 17, 36. By the recent enactment, also, of 20 & 21 Vict. c. 54, trustees are made liable, in case of fraudulent conversion of funds, to be indicted for a misdemeanor. As to which, vide post, vol. IV. p. 202.

(*o*) The nature of *assets*, was ex-

and legacies; and the distribution of residues, out of the estates, (whether legal or equitable,) of deceased persons; and the passing of the accounts of such estates;—under the authority of the Court (*l*). Such proceedings may be instituted either by a creditor, legatee, or next of kin, or even by the personal representative himself, when disinclined to undertake the responsibility of administering the assets (*m*). They are proceedings wholly foreign to the jurisdiction of the superior courts of the common law (*n*), which simply give effect to the claim of the particular creditor who sues there, to be paid out of such assets as a court of common law can notice, without ever undertaking a general distribution even of assets of this description; and entertain no claim for a distributive share of residue, nor (in general) for a legacy (*o*).

2. The Court of Chancery has long exercised the jurisdiction of *decreeing the specific performance of agreements*, instead of giving redress for their non-performance by way of damages; which a court of equity is incompetent to award (*p*). [And hence a fiction is established] in equity, [that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally.] This mode of relief, indeed, is confined, generally speaking, to contracts of lands, it not being the ordinary practice of courts of equity to enforce the specific performance of agreements relating to personalty; for the breach of those may in general be

plained, sup. vol. I. pp. 426—428; vol. II. p. 210.

(*l*) As to the nature of the jurisdiction exercised by a court of equity, in *marshalling* the assets, see Spence, Eq. Jur. vol. 2, p. 826.

(*m*) See 15 & 16 Vict. c. 86, ss. 45—47; Gen. Ord. 7th Aug. 1852.

(*n*) It will be recollected, however, that a distributive share under an intestacy, or a legacy under a will, may be now recovered in a *county court*, where the amount does not exceed 50*l.* Vide sup. vol. III. p. 381.

(*o*) The only case in which an action seems maintainable in a superior court of common law, for a legacy, is where a chattel has been specifically bequeathed, and the bequest assented to by the executor. Doe *v.* Guy, 3 East, 123; 2 Saund. by Wms. 137 (c), 6th edit.

(*p*) This practice of the Court of Chancery has been traced to the time of Edward the fourth. (1 Mad. Chan. p. 361.)

adequately redressed by an action at law (*q*). But contracts for the purchase of land or the like will be decreed to be specifically performed; and here the application of the doctrine above referred to, which considers as actually done that which ought to have been done, gives birth to nearly all the same consequences in equity, as would follow at law from a conveyance actually made to the vendee at the time specified in the contract. Thus, though the legal estate remains in the vendor till the conveyance is completely executed, the vendor is in equity considered as having been *trustee* for the vendee from the time specified in the contract; and the vendee, on the other hand, as a trustee for the vendor from the same period, so far as the purchase-money is concerned. With respect to the specific performance of an agreement it is to be remarked, that no decree or order for it, can be obtained from a court of law, though damages for the breach of it will be awarded there (*r*).

3. With respect to an *injunction*;—this may be obtained from a court of equity, in a variety of cases, to restrain the adverse party in the suit from committing any acts in violation of the plaintiff's rights (*s*): as, particularly, to re-

(*q*) As to specific performance of contracts, see Mortlock *v.* Buller, 10 Ves. jun. 315; 1 Mad. Chan. 402, Claringbould *v.* Curtis, 21 L. J. Ch. 541.

(*r*) By 17 & 18 Vict. c. 125, ss. 68—76, a writ of mandamus may now be obtained from any of the superior courts of law, commanding the defendant, in an action, to fulfil duties in the performance of which the plaintiff is interested, and which the defendant was bound, but has failed, to perform. But, upon the construction of the enactments of the statute on this subject, it has been decided, (Benson *v.* Paull, 6 Ell. & Bl. 373,) that the duties must be such as would be enforced by the *prerogative* writ of mandamus issued by the Court of Queen's Bench; as to which, vide sup. vol. III. bk. V. c. XII. The application, therefore, of a writ of mandamus under this statute, is of a limited, not a general nature.

(*s*) By 5 Vict. c. 5, s. 4, the Court of Chancery may, on motion or petition in a summary way, without bill filed, restrain the Bank of England or other public company from permitting a transfer of stock or shares, or from paying any dividend. And by orders of Chancery, 17th November, 1841, the mode of proceeding by writ of *distringas* on stock under that statute is regulated.

strain him from infringing a patent or copyright: or from committing waste or nuisance (*t*). It may be obtained at various stages of a cause, according to the circumstances of the case; and in some instances of an urgent nature, (if the case be supported by a proper affidavit,) may be obtained immediately upon the institution of the suit, and without any previous notice to the opposite party (*u*). In the course of an action, an injunction may now also be granted, as the reader will recollect, by a court of law; but it is by the effect of a very recent alteration of our system (*v*).

4. As to the *perpetuation of testimony*. The examination of witnesses never takes place at common law, except in reference to matters in respect of which some action or legal proceeding has been already commenced; but it is sometimes very material for the protection of existing rights, that the evidence relating to them should be taken and preserved, though they may not yet be the subject of any suit,—the position of the parties interested being such as not yet to afford any occasion or opportunity for litigation; for there may be reason, nevertheless, to expect a future legal contest of the right, and that at a period when the witnesses, now competent to give material evidence upon it, may have been removed by death. In such cases, therefore, a court of equity lends its aid by permitting either of the parties interested, to institute proceedings against the

(*t*) The practice with respect to injunctions to stay proceedings at law, (called *common* injunctions,) differed formerly, in some respects, from the practice with respect to injunctions to prevent waste or the like, (called *special* injunctions). But by 15 & 16 Vict. c. 86, s. 58, it is now provided, that the practice as to the former, shall for the future be assimilated to the practice as to the latter, so far as the nature of the case will permit. As to the common injunction, see also General Orders of 7th August, 1852, xlv.

(*u*) 1 Mad. Chan. 126. By 15 & 16 Vict. c. 76, s. 226, it is provided, that in case any action, suit, or proceeding, shall be commenced or prosecuted in disobedience of any injunction, the court in which it is so commenced or prosecuted, shall, on production of the writ of injunction, stay all further proceedings in such court; and this without prejudice to the liability of the person, so violating the injunction, to punishment for the contempt.

(*v*) 17 & 18 Vict. c. 125, ss. 79—82. Et vide 15 & 16 Vict. c. 83, s. 42; sup. vol. III. p. 457.

other; with a view to the mere perpetuation of the testimony, and without reference to any other present relief; and this is effected by taking down, as in an ordinary cause, the examinations or depositions of the witnesses,—which in the event of the right being tried at any future period, when the attendance of the witnesses can no longer be procured, may be received in evidence between the same parties or those claiming under them (*w*). And with a view to extend the application of so convenient and important a remedy, it is now lately enacted by the 5 & 6 Vict. c. 69, that any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity or office: or to any estate or interest in any property real or personal; the right or claim to which cannot by him be brought to trial before the happening of such event,—shall be entitled to file a bill in the High Court of Chancery, to perpetuate any testimony which may be material for establishing such claim or right.

These are the principal, (for we must pass by the minuter points,) [of the jurisdiction at present exercised in our courts of equity: which differs, we see, very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived at maturity; as appears from the principles laid down, and the jealousies entertained of their abuse, by our early juridical writers cited in a former page (*x*); and which were received and handed down by subsequent compilers, without attending to those gradual accessions and derelictions by which, in the course of a century, this mighty river had imperceptibly shifted its channel. Lambard, in particular, in the reign of Queen Elizabeth, lays it down (*y*), that

(*w*) This is most frequent when lands are devised by will, away from the heir at law; and the devisee institutes a suit to perpetuate the testimony of the witnesses to the will. This is what is usually meant by *proving a will in Chancery*. (3 Bl. Com. 450.)

(*x*) Vide sup. p. 30.

(*y*) Archeion, 80, 81.

[" equity should not be appealed unto but only in rare and " extraordinary matters; and that a good chancellor will " not arrogate authority in every complaint that shall be " brought before him, upon whatsoever suggestion: and " thereby both overthrow the authority of the courts of " common law, and bring upon men such a confusion and " uncertainty, as hardly any man should know how or " how long to hold his own assured to him." And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law, and not by will. But since the time when Lambard wrote, a set of great and eminent lawyers, who have successively held the Great Seal, have by degrees erected the system of relief administered by a court of equity into a regular science, which cannot be attained without study and experience, any more than the science of law; but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode or suit, as readily and with as much precision, in a court of equity, as in a court of law.

It would carry us beyond the bounds of our present purpose to go further into this matter. It seemed desirable to go so far; because strangers are apt to be confounded by nominal distinctions, and the loose unguarded expressions to be met with in the best of our writers; and thence to form erroneous ideas of the separate jurisdictions now existing in England, but which never were separated in any other country in the universe.

It hath also afforded us an opportunity to vindicate, on the one hand, the justice of our courts of law from being that harsh and illiberal rule, which many are too ready to suppose it; and, on the other, the justice of our courts of

[equity from being the result of mere arbitrary opinion, or an exercise of dictatorial power, which rides over the law of the land, and corrects, amends and controls it by the loose and fluctuating dictates of the conscience of a single judge.

III. It is now high time to proceed to the practice of our courts of equity thus explained and thus understood;] and in our remarks on this subject,—omitting all inferior jurisdictions,—we shall confine ourselves to the superior court, viz. the High Court of Chancery, held before the Lord Chancellor; with its branches, of which the Master of the Rolls and the Vice-chancellors are respectively the judges (*z*).

According to the new system of practice (comprising great improvements recently introduced by the provisions of various acts of parliament, and the General Orders of the court founded thereon (*a*)), [the first commencement of a *suit* in chancery,] which is analogous to an action in the common law courts, [is by preferring a bill to the Lord Chancellor in the style of a petition: "humbly complaining showeth unto his lordship A. B. &c., the above-named plaintiff (*b*), &c." This is in the nature of a declaration at common law, or a libel and allegation in the spiritual

(*z*) As to the High Court of Chancery and its branches, vide sup. bk. v. c. iv.

(*a*) See these statutes cited, sup. vol. III. p. 409, n. (*z*). Et vide sup. vol. I. p. 478, as to the new jurisdiction conferred on this court, by 19 & 20 Vict. c. 120, in dealing with *Settled estates*. As to the General Orders in Chancery, (which are extremely numerous,) see particularly, in reference to the course of proceedings in a suit, those issued in May, 1845; April, June, and November, 1850; August, October, and December, 1852; June, 1854, January and November, 1855; August and November, 1856; January and February, 1857. The most important of the improvements referred to in the text, were recommended by the commissioners appointed in 1850 for inquiring into the practice of the Court of Chancery.

(*b*) As to the proper parties to a suit, and objections in reference to want of parties, &c., new regulations were made by 15 & 16 Vict. c. 86, ss. 42, 43, 44, 49, 51, 52. And see General Orders 7 August, 1852, xliii. As to motion or application *without bill*, vide post, p. 54.

[courts (*c*); setting forth the circumstances of the case, as some fraud, trust or hardship; and praying relief, as the case may require (*d*): and if the object of the bill be to stay waste or other injury, or to stay proceedings at law, an injunction is also prayed (*e*).

The bill must be signed by counsel, as a certificate of its decency and propriety.] For neither the bill nor any other pleading must contain scandalous or impertinent matter, the costs occasioned by which will be ordered to be paid by the party introducing the same; and matter of a scandalous kind will be also ordered to be expunged (*f*).

The bill (which must be printed) (*g*) has also subscribed to it the names of the several defendants, and the name and place of abode of the plaintiff's solicitor; and it is filed in court (*h*), and served on the defendant by delivering a copy thereof either to himself personally, or leaving the

(*c*) Vide sup. p. 16.

(*d*) Though the bill usually prays some equitable relief, yet by 15 & 16 Vict. c. 86, s. 50, no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby; and it shall be lawful for the court to make binding declarations of right, without granting consequential relief.

(*e*) See Wood *v.* Beadell, 3 Sim. 273.

(*f*) See Gen. Ord. 8 May, 1845, xlii.; 15 & 16 Vict. c. 86, s. 17; Gen. Ord. 7 August, 1852, xxx. Formerly bills or other pleadings might be *excepted to* for impertinence. As to *exceptions*, vidè post, p. 44. But exceptions for impertinence are now abolished by 15 & 16 Vict. c. 86, s. 17.

(*g*) Where, however, the bill prays a writ of injunction, or a writ *ne exeat regno*; or is filed for the purpose solely, or *inter alia*, of making an infant a ward of the court; a written copy may be filed in the first instance, on the personal undertaking of the plaintiff, or his solicitor, to file a printed copy within fourteen days. (15 & 16 Vict. c. 86, s. 6.)

(*h*) Filing is now performed by the clerks of records and writs. (5 & 6 Vict. c. 103; Ord. 26 Oct. 1842, r. 3; 15 & 16 Vict. c. 86, s. 1.) By Gen. Ord. 5 May, 1837, r. 1, every bill before being filed must be marked either with the words "lord chancellor" or the words "master of the rolls;" and by Gen. Ord. 11 November, 1841, where the bill is marked "lord chancellor," the plaintiff shall write underneath, the title of one of the three vice-chancellors, at his option; and the cause shall thenceforth be attached to such vice-chancellor's court.

same at his dwelling-house (*i*). And on the bill so served there is an indorsement, commanding the defendant to appear within eight days after the service, and that he observe what the court shall direct (*k*).

If the defendant, on service of the bill, should neglect to appear within the time limited by the rules of the court, the plaintiff may apply that an appearance may be entered for him; and such further proceedings may be had in the cause as if defendant had actually appeared (*l*).

If, on the other hand, the defendant absconds, so that it is found impracticable to serve the bill, the court may order an appearance at a certain day, a copy of which order shall be inserted in the London Gazette, and otherwise published as the court may direct; and if the defendant should fail to appear at the time so appointed, the court may order an appearance to be entered for him on the application of the plaintiff (*m*). In cases also where the defendant's intention to leave the kingdom, in order to avoid process, is known, and there is an equitable demand against him of a pecuniary kind and of certain amount; the plaintiff is entitled immediately, upon bill filed and upon a proper affidavit of the facts, to apply to the court for a writ of *ne exeat regno* to restrain the defendant's departure, until security for payment shall have been given (*n*).

Upon the defendant's appearance, the plantiff is entitled to have the defendant examined in answer to the bill, and

(*i*) 15 & 16 Vict. c. 86, s. 5.

(*k*) Ibid. s. 3, and schedule to the Act. This service of the bill, with an indorsement, is in lieu of the former practice of serving a writ of *subpœna*, which is abolished. (15 & 16 Vict. c. 86, ss. 2, 3.)

(*l*) Gen. Ord. 8 May, 1845, xxix.; 15 & 16 Vict. c. 86, s. 4.

(*m*) Gen. Ord. 8 May, 1845, xxxi.; 15 & 16 Vict. c. 86, s. 4. Et vide 11 Geo. 4 & 1 Will. 4, c. 36, s. 3.

(*n*) See Dan. Pr. by Headlam, p. 271. If the defendant be out of the jurisdiction of the court, at the time the suit is commenced, the court may order the bill to be served in such places as it thinks fit. (Gen. Ord. 8 May, 1845, xxxiii.; 15 & 16 Vict. c. 86, s. 4; et vide 2 Will. 4, c. 33; 4 & 5 Will. 4, c. 82.)

for that purpose to file interrogatories (*o*); a copy of which is to be delivered to the defendant, who within due time must either put in his *answer*, or his *demurrer* or *plea;* and even if the plaintiff requires no answer, yet it is competent to the defendant, if he think fit, to put in any of these, of his own accord. If on the other hand, on an answer being required, he neither answers, pleads nor demurs, he is then said to be in contempt; and upon proper process in that behalf he may be committed to prison, or, (if he is not to be found,) his lands and goods may be sequestrated, until he clears his contempt (*p*). The plaintiff also, in such case, is entitled to have an order that the bill be taken *pro confesso* (*q*). If the defendant, however, makes oath that, by reason of poverty, he is unable to employ a solicitor to put in his answer, and the allegation should appear to be true, a solicitor and counsel will be assigned him by the court for that purpose (*r*).

But the defendant shall be supposed to pursue the regular course; and either to demur, to plead, or to answer.

[A *demurrer* in equity is nearly of the same nature as a demurrer in law, being an appeal to the judgment of the court,] whether upon the face of the bill itself the defendant shall be bound to answer; [as, for want of sufficient matter of equity therein contained;] or where [the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehaviour:]

(*o*) Formerly the interrogatories were contained in the bill itself, and were inserted in every case. But now by 15 & 16 Vict. c. 86, s. 10, the bill shall contain no interrogatories for the examination of the defendant.

(*p*) He is also in contempt, if after service he fails to appear; but in this case, as already stated, there is now a remedy, by entering an appearance for him, which in effect supersedes the process of contempt.

(*q*) Gen. Ord. 8 May, 1845, lxxvi., &c. A defendant against whom an order to take a bill *pro confesso* is made, is at liberty to appear at the hearing of the cause; and if he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits, as stated in the bill. Gen. (Ord. 8 May, 1845, lxxxii.)

(*r*) Gen. Ord. 8 May, 1845, lxxv.

and the effect of a demurrer is that, if allowed, the plaintiff's bill shall be dismissed; if overruled, the defendant is ordered to answer.

A *plea* is founded upon some matter not apparent on the face of the bill: and [may be either to the jurisdiction; showing that the court has no cognizance of the cause; or to the person; showing some disability in the plaintiff, as by outlawry and the like: or it is in bar; showing some matter wherefore the plaintiff can demand no relief,—as an act of parliament, a release, or a formal decree. And the truth of this plea the defendant is bound to prove, if put upon it by the plaintiff. But as bills are often of a complicated nature, and contain various matter, a man may plead as to part, demur as to part, and answer as to the residue. But no exceptions to formal *minutiæ* in the pleadings will be here allowed; for the parties are at liberty, on the discovery of any errors in form, to amend them (*s*).

An *answer* is the most usual defence that is made to a plaintiff's bill.] It is the statement of the defendant himself as to those matters of fact to which the bill refers, or as to which interrogatories are filed; and by means of it, the plaintiff obtains a *discovery*, as it is called, of facts which it might be otherwise impossible to prove (*t*). This state-

(*s*) "*En cest Court de Chauncerie, homme ne serra prejudice par son mispledying ou pur defaut de forme, mes solonque le veryte del mater, car il doit agarder solonque consciens, et nemi ex rigore juris.*"—(Dyversité des Courtes, edit. 1534, fol. 296, 297; Bro. Abr. tit. Jurisdiction, 50.) And as to plaintiff's power of amending bill, vide Gen. Ord. April, 1847.

(*t*) Until a recent period, the party to an action could not be compelled, in a court of *common law*, to give evidence; and *discovery* was an incident, therefore, peculiar to a court of equity; and one that of course tended most materially to amplify its jurisdiction. But, by 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83, either of the parties is now, in most cases, competent and compellable to be examined as a *witness* at the trial of the cause. And, by 17 & 18 Vict. c. 125, ss. 51—57, *interrogatories* may now be delivered, in actions in the common law courts, by either of the parties, to the opposite party, as to any matter on which *discovery* may be sought.

ment [is given in upon oath, or the honour of a peer or peeress (*u*); but where there are amicable defendants, their answer is usually taken without oath, by consent of the plaintiff (*x*).]

[An answer must either deny or confess all the material parts of the bill.] And where it does not deny, [it may confess and avoid, that is, justify or palliate the facts;] or it may simply admit the case made by the bill, and submit to the judgment of the court upon it. But the defendant may in his answer, besides addressing himself to the bill or interrogatories, introduce such statements material to the case, as he may think it advisable to set forth; and he is also at liberty, in support of his case, to file interrogatories for the examination of the plaintiff, in order to obtain from him a discovery of any material facts (*y*). Where, however, he has any relief to pray against the plaintiff, [he must do it by an original bill of his own, which is called a *cross bill* (*z*).]

If the plaintiff considers the answer as insufficient, he may take *exceptions* thereto, (which, if allowed, will oblige the defendant to put in a more sufficient one); or, on the other hand, [if the plaintiff finds sufficient matter confessed in the answer to ground a decree upon, he may proceed to the *hearing of the cause upon bill and answer only.* But in that case, he must take the defendant's answer to be true in every point:] and if he finds that it would be unsafe to admit this, and that his case requires him to controvert the truth of some matter that the defendant has alleged; or to go into evidence in support of what he has himself alleged; he is at liberty to *reply* to the answer,—[averring his bill to be true, certain, and sufficient, and the defendant's answer to be directly the reverse, which he is ready to prove as the

(*u*) But if a peer be examined as a *witness*, he must be sworn. (Meers *v.* Lord Stourton, 1 P. W. 146.)

(*x*) The answer must be signed by counsel, unless taken in the country. (Brown *v.* Bruce, 2 Mer. 1.)

(*y*) 15 & 16 Vict. c. 86, s. 19.

(*z*) As to cross bills, see Gen. Ord. 26 Aug. 1841, r. 41, &c.

[court shall award.] So a replication may be filed by the plaintiff, in case he shall not have required an answer, and the defendant shall not have exercised his right of putting in an answer, plea, or demurrer, without requisition,—for the rule is that the defendant in this case shall be considered as having *traversed* (or denied) the case made by the bill (*a*). Upon the filing of the replication, either under these circumstances, or after an answer made, the cause is deemed to be *at issue* (*b*); and the parties then proceed to proof of the facts.

However, it is competent to the plaintiff under any circumstances, instead of filing a replication, to take the course, (after answer, or after the time for answer has expired,) of *moving the court for such decree or decretal order as he may think himself entitled to*; upon which both he and the defendant, will be at liberty to file affidavits on either side: and the cause will be disposed of in this summary way, upon motion; or, the court will give such directions as to the further prosecution of the suit as the circumstances may be found to require (*c*).

But if, instead of this, a replication be filed, and the cause be brought to issue, and the parties proceed to proof in the regular way; the course then is for the plaintiff to give notice to the defendant of the nature of the proof that the former elects; viz. whether he desires the evidence to be taken *orally*, or *upon affidavit* (*d*);—it being, however, in the power of the defendant, (or of any party to the suit,) to insist on its being taken orally (*e*). Supposing the oral method to be pursued, the witnesses are examined, cross-examined,

(*a*) 15 & 16 Vict. c. 86, s. 26; Gen. Ord. 7 August, 1852, xxviii.

(*b*) Gen. Ord. 8 May, 1845, xciii. The cause was formerly not at issue till the service of a *subpœna to rejoin*; but no subpœna to rejoin is hereafter to be issued. Ibid.

(*c*) 15 & 16 Vict. c. 86, s. 15; Gen. Ord. 7 August, 1852, xxv.

(*d*) By 17 & 18 Vict. c. 125, s. 20, a person objecting to be sworn, from conscientious motives, may *affirm* instead of being sworn as a witness, or of making affidavit or a deposition on oath. By sect. 103, this section is extended to every court of civil judicature in England and Ireland.

(*e*) 15 & 16 Vict. c. 86, ss. 29, 30; Gen. Ord. 7 August, 1852, xxxi.

and re-examined *vivâ voce* before an *Examiner* of the court (*f*), in the presence of the parties, their counsel, solicitor, or agent; and the Examiner takes down their depositions (*g*), which are afterwards transmitted by him to the Record Office of the court to be filed; and any party to the suit is entitled to have a copy, on payment of a regulated fee (*h*). As to the proof so taken, we need only add, that the rules as to the competency of witnesses, and generally the whole law of evidence, are the same as those which obtain in a court of common law, and to which our attention was called in a former part of the work (*i*).

The evidence (whether taken orally or on affidavit) must be *closed* within a certain period, limited by the practice of the court (*j*): and the cause is then ripe to be set down for hearing (*k*); [and either party may be *subpœnaed* to hear judgment on the day fixed for the hearing; and then, if the plaintiff does not attend, his bill is dismissed with costs.] On the other hand, if the defendant makes default, a decree will be made against him (*l*).

(*f*) As to the Examiners of the Court of Chancery, see 16 & 17 Vict. c. 22.

(*g*) Instead of a deposition, the party may *affirm* in the case before noticed, sup. p. 45, n. (*d*).

(*h*) 15 & 16 Vict. c. 86, ss. 31—36. As to the form of the depositions, see also 3 & 4 Will. 4, c. 94; Gen. Ord. 8 May, 1845, cvii. Prior to the 15 & 16 Vict. c. 86, the course of proof, in lieu of that above described, was by the examination of the witnesses before commissioners, taking their written depositions in answer to written interrogatories, and in the absence of the parties, according to the method of the civil law. But by 15 & 16 Vict. c. 86, s. 29, this mode is abolished. See also 16 & 17 Vict. c. 78, as to the appointment of commissioners to take oaths and declarations in chancery.

(*i*) See 17 & 18 Vict. c. 125, s. 103.

(*j*) 15 & 16 Vict. c. 86, s. 38; Gen. Ord. 7 August, 1852, xxxii.

(*k*) The hearing may be before either the master of the rolls or one of the vice-chancellors, according to the manner in which the cause has been previously appropriated by the marking of the bill, as before explained, (vide sup. p. 40, n. (*h*), or it may take place, if so ordered, before the lord chancellor himself.

(*l*) By Gen. Ord. 26 Aug. 1841, r. 44, where a defendant makes default at the hearing of a cause, the decree shall be absolute in the first instance, without giving the defendant a day to show cause.

[When there are cross causes, or a cross bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them. The method of hearing causes in court is this. The parties on both sides appearing by their counsel, the plaintiff's bill is first opened or briefly abridged, and the defendant's answer also, by the junior counsel on each side (*m*); after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom; and then such depositions, as are called for by the plaintiff, are read] in court, [and the plaintiff may also read such part of the defendant's answer as he thinks material or convenient: and after this the rest of the counsel for the plaintiff make their observations and arguments.] Then the defendant's counsel go through the same process for him, and the leading counsel for the plaintiff is heard in reply. [When all are heard, the court pronounces the *decree*, adjusting every point in debate according to equity; which decree being usually very long, the minutes of it are taken down by the Registrar. The matter of costs to be given to either party is not here held to be a point of right but merely discretionary, (by the stat. 17 Ric. II. c. 6,) according to the circumstances of the case, as they appear more or less favourable to the party vanquished; and yet the stat. 15 Hen. VI. c. 4, seems expressly to direct, that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

The decree is either *interlocutory* or *final*. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court usually directs the matter to be tried by jury; especially such important facts as the validity of a will, or whether A. is the heir at law to B. But as no jury can be

(*m*) In 2 Dan. Pract. (by Headlam), p. 760, it is remarked, that the opening of the bill and answer by the junior counsel is now usually dispensed with by the court.

[summoned to attend this court, the fact is usually directed to be tried in a court of common law.] This was formerly done in the form of a *feigned issue;* that is, a series of pleadings was arranged between the parties, in the same form as if an action had been commenced at common law, upon a *wager* involving the fact in dispute; and the issue joined thereon was referred, (as it would be in the case of an ordinary action,) to a jury. But by 8 & 9 Vict. c. 109, s. 19, any question of fact may now be referred to a jury by any court, either of law or equity, in a direct form (*n*).

[Another thing also retards the completion of decrees. Frequently long accounts are to be settled, incumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a decree can do full and sufficient justice.] The investigation of these matters is conducted either by the Master of the Rolls, (or by one of the Vice-chancellors,) sitting *at chambers;* or by his chief clerk acting there under his direction: and the result is stated in the form of a short certificate, (or, if the judge so directs, a formal report); which, if the judge approves, he signs and adopts (*o*).

When the inquiries, or inquiry, directed by the decree are completed, the cause is again brought before the court. A final decree is then made, the performance of which is

(*n*) Not only does the Court of Chancery sometimes refer questions of *fact* to a jury, but prior to the passing of 15 & 16 Vict. c. 86, it was also the practice of that court, when any question of mere *law* arose in the course of a cause, to refer it to the opinion of one of the superior common law courts; who, after hearing an argument upon it, certified their opinion accordingly to the lord chancellor; and upon such certificate the decree was usually founded. But by the 61st section of that act this course is now prohibited; and the Court of Chancery has power to determine all questions of law necessary to the decision of the equitable question at issue.

(*o*) It is provided by 15 & 16 Vict. c. 18, ss. 26—30, that this course may be taken with respect to all such matters as may be more conveniently disposed of at chambers than in open court. Such matters as these were formerly referred to a master in chancery. As to the *masters in chancery*, vide sup. vol. III. p. 409, note (*b*).

enforced, if necessary, by attachment of the person (*p*) and sequestration of the estate (*q*). On due service also of a decree or order for delivery of possession of an estate, the party prosecuting the same is entitled to a *writ of assistance;* directed to the sheriff of the county in which the lands lie, and authorizing him to enter the premises and eject the defendant, and put the plaintiff in possession. Moreover, by 11 Geo. IV. & 1 Will. IV. c. 36, s. 15, where any person has been committed for a contempt, for not executing any instrument as the Court has directed, the court may, under such circumstances as in the statute mentioned, order the same to be officially executed. And by 1 & 2 Vict. c. 110, s. 1, all decrees and orders of the courts of equity, and all orders of the Lord Chancellor in matters of lunacy, (whereby any sum of money or costs shall be payable to any person,)—shall have the effect of judgments in the superior courts of common law (*r*), and the persons to whom the payment is to be made shall be deemed judgment creditors, within the meaning of that Act (*s*).

[If by the decree either party thinks himself aggrieved, he may petition for a *rehearing*] before the judge by whom it was pronounced, (whether the Lord Chancellor, the Master of the Rolls, or one of the vice-chancellors); or, unless pronounced by the Lord Chancellor himself, may *appeal* to the Lord Chancellor; and the Lord Chancellor may, if he think

(*p*) See Roberts *v.* Ball, 19 Jur. 586.

(*q*) See Orders 10th May, 1839; 15th Ord. Aug. 1841. When a decree is obtained against a person having privilege of peerage or of parliament there can be no proceeding by attachment, but by sequestration only.

(*r*) As to the effect of judgments in the superior courts of common law, vide sup. vol. III. p. 642. To affect any lands, tenements or hereditaments, as to purchasers, mortgagees and creditors, it is to be observed, that all judgments, decrees and orders require to be *registered*, s. 19; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15.

(*s*) By Orders of 10th May, 1839, founded on the above statute of 1 & 2 Vict. c. 110, if payment be not made within one month from the entry of the decree or order, the person to whom it was ordered to be made may sue out one or more writs of *fieri facias* or *elegit*, of the same nature with the writs issued, under those names, by the courts of common law.

fit, refer the matter to the court of appeal in chancery (*s*). [But after the decree is once signed] by the Lord Chancellor, (which is always necessary before enrolment (*t*)), [and enrolled,—it cannot be reheard or rectified, but by bill of review, or by appeal to the House of Lords.

A *bill of review* may be had upon apparent error in judgment, appearing on the face of the decree; or, by special leave of the court, upon oath made of the discovery of new matter of evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter, then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

An *appeal to parliament*, that is, to the House of Lords (*u*), is the dernier resort of the subject who thinks himself aggrieved (*v*), either by an interlocutory order or a final determination in this court (*w*); and it is effected by

(*s*) By Order of 7th August, 1852, no appeal or rehearing shall be allowed unless set down for hearing, and notice thereof served, within five years from the date of the decree—except by special order. Appeals may be heard either before the lord chancellor sitting alone, or before the court of appeal in chancery, at the discretion of the lord chancellor. (14 & 15 Vict. c. 83, s. 12.) As to the court of appeal in chancery, vide sup. vol. III. p. 411.

(*t*) 3 Geo. 2, c. 30.

(*u*) Vide sup. vol. III. p. 412.

(*v*) This jurisdiction is said (Com. Journ. 13th March, 1704) to have begun in the eighteenth year of James the first; and it is certain that the first petition which appears in the records of parliament was preferred in that year (Lords' Journ. 23rd March, 1620); and that the first which was heard and determined, (though the name of *appeal* was then a novelty,) was presented in a few months after (Lords' Journ. 3rd, 11th, 12th December, 1621),—both levelled against the lord chancellor Bacon for corruption and other misbehaviour. It was afterwards warmly controverted by the house of commons, in the reign of Charles the second. (Com. Journ. 19th November, 1675.) But this dispute is now at rest; (Show. Par. Ca. 81); it being obvious to the reason of all mankind, that when the courts of equity became principal tribunals for deciding causes of property, a revision of their decrees, by way of appeal, became as necessary as the revision of the judgments of the courts of common law, by a proceeding in error.

(*w*) By 14 & 15 Vict. c. 83, s. 10, this extends to the decisions of the court of appeal in chancery.

[*petition* (*x*) to that House,] the decree or order having been first enrolled (*y*). The petition in this case must be signed by two counsel (of those engaged in the court below, or on the appeal), who must certify that there is a reasonable cause of appeal (*z*); upon presenting which, and upon the appellant's entering into recognizance to pay all such costs as the House shall think fit to award (*a*), an order is made directing the respondent to put in his answer; which being done, either party may then apply to have the cause appointed for hearing: and the appellant and respondent are respectively to deliver their printed cases,—signed by one or more counsel engaged in the court below or in the hearing of the appeal, and containing a narrative of the proceedings below, with so much of the proofs as the parties intend respectively to rely upon (*b*). [But no new evidence is admitted in the House of Lords upon any account,—this being a distinct jurisdiction (*c*): which differs it very considerably from those instances wherein the same jurisdiction revises and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law, (though constantly followed in the spiritual courts,) when any superior court is reviewing the sentence of an inferior, to examine the justice of the former decree, by evidence that was never produced below.]

We have thus touched upon the principal circumstances

(*x*) By 55th Standing Order, House of Lords, 13th July, 1678, petitions of appeal from any court of equity must be presented within fourteen days after the first day of the meeting of parliament, or fourteen days after the decree made and entered; and by 118th Order, no petition of appeal from any decree in equity shall be received after two years from the signing and enrolling or extracting of the decree, and the end of fourteen days after the first day of the meeting of parliament next ensuing, unless the appellant be under disability, &c.

(*y*) By Gen. Ord. 7th Aug. 1852, no enrolment of any decree or order shall be allowed after the expiration of five years from the date thereof, unless by special order.

(*z*) 58th Standing Order, House of Lords, 3rd March, 1697.

(*a*) See Ord. 26th Jan. 1810.

(*b*) See Lords' S. O. cxv, cxvii.

(*c*) Gilb. Rep. 155, 156.

of a suit in chancery, adhering throughout to the regular and ordinary course of that proceeding. But there are some variations and occasional incidents, of which it will be proper here to take some notice.

1. It often happens in the course of a suit, that either of the parties have occasion to *amend;* and more particularly this happens in the case of a plaintiff, where, upon the putting in of the answer, the new light afforded by it suggests the necessity of adding new parties, or introducing new matter by way of amendment of his bill. Such an amendment is in all cases allowed, at least upon payment of costs; and the defendant must answer afresh to the bill so amended. And this extends even to facts which may have occurred since the institution of the suit, if the cause is otherwise in such a state as to allow of amendment; or if not, the plaintiff is at liberty to annex a statement of such facts to the bill, and to require an answer to it from the defendant (*d*).

2. It frequently happens that the suit is abated by death or marriage of parties, or becomes defective by reason of some change or transmission of interest or liability. In such cases an order of *revivor,* to revive or carry on the proceedings, may in general be obtained as of course (*e*); and by serving it on all proper persons, they will become parties to the suit, and will be bound to appear to the same;—a guardian *ad litem* however being first appointed for such of them as may be infants or under any disability, that of coverture excepted (*f*).

3. Any person seeking equitable relief, may do so in a cheap and summary way (by leave of the court in all cases, and in certain specified cases even without leave of the

(*d*) 15 & 16 Vict. c. 86, s. 53; Gen. Ord. 7th August, 1852, vii, xliv. Prior to this statute if the plaintiff wished to state circumstances arising since the institution of the suit, he was obliged to exhibit a *supplemental bill.*

(*e*) See 17 & 18 Vict. c. 100, s. 3.

(*f*) 15 & 16 Vict. c. 86, s. 52; Gen. Ord. 7th August, 1852, xliii. Prior to this statute, it was necessary in such cases to resort to a *bill of revivor,* or in some instances to a *supplemental bill.*

court), by filing a *claim*, instead of a *bill* in the usual form. This is to be indorsed, and served like a bill; requiring the defendant, by the indorsement, to enter an appearance, and on a day named (or on the next seal or motion day), at an hour also named, to show cause in court why such relief as claimed by the plaintiff should not be had: and upon such showing cause, which may be done upon *affidavit*, (though the defendant is also entitled, as in the case of a bill, to examine the plaintiff on interrogatories, or file a cross bill for discovery,) the court may make an order granting or refusing the relief claimed; or if it should appear necessary for the purpose of justice that a bill should be filed, the court may direct the same to be done accordingly (*g*).

4. By another provision also recently introduced, with a view to the same object of diminishing delay and expense, persons interested in any question cognizable in the Court of Chancery (other than questions in bankruptcy, which constitutes a distinct and peculiar subject of jurisdiction), if they can concur in stating such question in the form of a *special case* for the opinion of the court,—are entitled to file such special case accordingly; subject to certain provisions for the protection of lunatics, married women, and infants, when they are included as concurring parties; and such special case having been set down for hearing, the court is authorized to determine the question, and by decree to declare its opinion thereon, without proceeding to administer any relief; and the declaration shall be as binding as it would have been if it had been contained in a decree made in a suit between the same parties, instituted by bill; and all executors, administrators, or trustees, making any payment, or doing any act in conformity with the declaration, shall be protected, as they would have been by the express order of the court, made in such suit (*h*).

(*g*) Gen. Ord. of 22d April, 1850, and 7th August, 1852, and 15 & 16 Vict. c. 86.

(*h*) 13 & 14 Vict. c. 35. An analogous provision, it will be recollected, was introduced, as regards a suit at *law*, by 3 & 4 Will. 4, c. 42, s. 25, and has been since extended by 15 & 16 Vict. c. 76, s. 42.

5. There may also take place in the course of a suit (and sometimes without bill (*i*),) certain occasional or interlocutory incidents, viz., *motions* and *petitions*. The first of these may be made at all stages of a suit, and are analogous to motions in the court of common law (*k*): but with this difference, that instead of granting, on a hearing *ex parte*, a rule to show cause in the first instance, a court of equity proceeds, in the first instance, to a hearing of the parties on both sides; requiring him, however, by whom the motion is made, to give previous notice to his adversary of the nature and time of the intended application. A *petition* also is an incident of an interlocutory kind, similar in general to a motion; but adopted in certain cases where a more special statement is required, than can conveniently be comprised in a mere notice of motion. Such statement is accordingly prepared in the form of a petition to one of the judges in equity,—concluding with a prayer of the appropriate relief; on which a day is appointed by the judge for the hearing, and a copy of the petition and the appointment served on the opposite party.

6. Finally, it is to be remarked, that, though a suit in chancery is in general instituted by bill or claim, this is not invariably the case,—for where the equitable rights of the Crown are concerned, (or the rights of those who are under its particular protection, such as the objects of a public charity,) the matter of complaint is brought forward by way of *information* filed in the name of the attorney-general or of the solicitor-general (*l*). If the rights of the Crown itself are not concerned, this is done at the instance of some person whose name is inserted in the information; and who is termed the *relator*, and made responsible for costs. Proceedings in chancery indeed in the matter of charities, may also be by another method; for by 52 Geo. III. c. 101, in all cases of breach of charitable trust; or whenever the direction of a court of equity shall be deemed necessary for

(*i*) See 18 & 19 Vict. c. 134, s. 16.

(*k*) As to motions, vide sup. vol. III. bk. v. c. XI.

(*l*) 2 Madd. 164.

the administration of such trust; any two or more persons may, (on obtaining the previous sanction of the attorney-general or solicitor-general,) apply for relief by way of *petition* to the Lord Chancellor, Master of the Rolls, or keeper of the Great Seal; and such petition shall be heard in a summary way; and the order which the Court makes thereon shall be conclusive, unless within two years afterwards there be an appeal to the House of Lords (*m*).

(*m*) See also the provisions contained in 16 & 17 Vict. c. 137 (The Charitable Trusts Act, 1853), s. 28, as to making application at *chambers*, (and without information, bill or petition,) in matters relating to charities.

CHAPTER XV.

OF CIVIL INJURIES PROCEEDING FROM OR AFFECTING THE CROWN.



HAVING thus considered the civil injuries, or [private wrongs, that may be offered by one subject to another,—all of which are redressed by the command and authority of the sovereign signified by his writs returnable in his several courts of justice, which thence derive jurisdiction of examining and determining the complaint,—we proceed now to inquire into the mode of redressing those injuries, to which the Crown itself is a party: which injuries are either when the Crown is the aggressor, (and which therefore cannot without a solecism admit of the same kind of remedy (*a*);) or else is the sufferer, and which then are usually remedied by peculiar forms of process appropriated to the royal prerogative.

In treating therefore of these we will consider, first, the manner of redressing those wrongs or injuries which a subject may suffer from the Crown; and then of redressing those, which the Crown may receive from a subject.

I. As to the method of redressing such injuries as the subject may receive from the Crown.

That the sovereign can do no wrong is a necessary and fundamental principle of the English constitution;] yet, as observed in a former part of this work, his acts may in themselves be contrary to law, and subject on that ground to reversal (*b*).

(*a*) Bro. Ab. tit. Petition, 12, tit. Prerog. 2.

(*b*) Vide sup. vol. II. pp. 473, 489.

For [whenever it happens that, by misinformation, or inadvertence, the Crown hath been induced to invade the private rights of any of its subjects,] and the sovereign becomes by a proper representation informed of the injury sustained,—the law always then [presumes that to know of any injury and to redress it are inseparable in the royal breast;] and [issues as of course, in the sovereign's own name, his order to his judges to do justice to the party aggrieved.]

Though [the distance between the sovereign and his subjects is such that it rarely can happen,] as observed in a former place (*c*), [that any *personal* injury can proceed from the prince to any private man;] and the law [in decency supposes that it never can or will happen at all:] yet [injuries to the rights of *property* can scarcely be committed by the Crown without the intervention of its officers; for whom the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of those agents, by whom the sovereign has been deceived and induced to do a temporary injustice.]

As in ordinary cases, however, the Crown itself is the medium through which justice is obtained, so no relief can in general be had against the Crown by the ordinary methods of the common law or equity (*d*); but only by such

(*c*) Vide sup. vol. II. p. 491.

(*d*) 3 Bl. Com. 255; Jenkins, 78; Finch, L. 83. It is said, in some books, that before the time of Edward the first, the king might be sued as a common person, the form being, "*Præcipe Henrico regi Angliæ;*" but this seems of questionable authority. (Vide Bac. Ab. Prerog. E. 7.) Where the rights of the Crown, however, extend only to the superintendence of a public trust,—as in the case of a charity, or where its rights are only incidentally concerned, and no attempt is made to divest its possession or title,—the proceeding may be by bill in Chancery, making the attorney-general defendant; and even when the object is to divest the title or possession of the Crown, the sovereign may refer it to the lord chancellor to do right; and may direct that the attorney-general shall be made a party to a suit in Chancery, to that purpose. Christian's Bl. vol. iii. p. 428, cites Balch *v.* Wastall, 1 P. Wms. 445; Reeve *v.* Attorney-General, (mentioned in) 1

special forms of proceeding as the common law has provided for this particular case.

[The common law methods of obtaining possession or restitution from the Crown, of either real or personal property, are 1st, by *petition de droit* or petition of right (*e*), which is said to owe its origin to Edward the first (*f*); 2ndly, by *monstrans de droit* (*g*), manifestation or plea of right: both of which may be preferred or prosecuted either on the common law side of the Court of Chancery, or in the Exchequer (*h*). The former is of use when the Crown is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself: in which case, he must be careful to state truly the whole title of the Crown, otherwise the petition shall abate (*i*); and then, upon this answer being indorsed or underwritten by the Crown *soit droit fait al partie* (let right be done to the party (*j*)), a commission shall issue to inquire into the truth of the suggestion (*k*); after the return to which the attorney-general is at liberty to plead in bar; and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. Thus, if a disseisor of lands which are holden of the Crown, dies seised without any heir, whereby the Crown is *primâ facie* entitled to the lands, and the possession is cast on it, either by inquest of office, or by act of law, without any office found;

Ves. 445; 2 Roll. Abr. 213; Mitf. Treat. on Pleadings in Chancery; et vide Simpson *v.* Clayton, 4 Bing. N. C. 766.

(*e*) As to the form and nature of a petition of right, see Co. Entr. 419; and Smith *v.* Upton, 6 Man. & G. 252; Baron de Bode's case, 8 Q. B. 208.

(*f*) Bro. Ab. tit. Prerog. 2; Fitz. Ab. tit. Error, 8. A petition of right was presented in the year 1833, upon the claim of Sir W. Clayton for the renewal of a crown lease, but was dropped; vide Simpson *v.* Clayton, 4 Bing. N. C. 766.

(*g*) See the form, Co. Entr. 402.

(*h*) As to the proceedings both on *petition de droit* and *monstrans de droit*, full information will be found in the Treatise of the Prerogative of the Crown, by Mr. J. Chitty, jun., p. 345—356.

(*i*) Finch, L. 255.

(*j*) St. Tr. vii. 134.

(*k*) Skin. 608; Rast. Ent. 461.

[now the disseisee shall have remedy by petition of right, suggesting the title of the Crown and his own superior right before the disseisin made (*l*)]

But where the Crown is in possession, under a title the facts of which are already set forth upon record, a party thereby aggrieved may have *monstrans de droit,* which is putting in, in opposition to such recorded title, a claim of right grounded on certain facts relied upon by the claimant, without denying those relied upon by the Crown (*m*), [and praying the judgment of the court whether upon those facts the sovereign or the subject had the right;] as if in the case before supposed, it is found by inquisition or inquest of office, (a proceeding that we shall have occasion presently to explain,) that a tenant of the Crown died seised without heir, whereby the Crown is *primâ facie* entitled, —the disseisee may have remedy by *monstrans de droit* at the common law (*n*), setting forth that he had been disseised by such tenant (*o*). But [as the remedy by petition was extremely tedious and expensive, that of *monstrans* was much enlarged, and rendered almost universal by several statutes; (particularly 36 Edward III. c. 13, and 2 & 3 Edward VI. c. 8;) which also allow inquisitions of office to be *traversed* (or denied), whenever the right of a subject is concerned, except in a very few cases (*p*).]

As to the course of proceeding, we may remark, that [if upon either the *petition de droit* or *monstrans de droit,* the right be determined against the Crown, the judgment is] that of *ouster le main,* or *amoveas manus,* viz. ["*quod manus*

(*l*) Bro. Ab. tit. Petition, 20; 4 Rep. 58.

(*m*) According to Blackstone, a *monstrans de droit* is putting in a claim of right founded on facts already acknowledged and established. 3 Bl. Com. 256. But it is clear that new facts may be introduced in a *monstrans de droit* by virtue of the statutes 36 Edw. 3, c. 13, and 2 & 3 Edw. 6, c. 8. (See Co. Entr. 402.)

(*n*) 4 Rep. 55. See also Bac. Abr. tit. Prerog. E. 7.

(*o*) Co. Entr. ubi sup.

(*p*) Skin. 608. As to the traverse of an inquisition in case of *lunacy,* see 16 & 17 Vict. c. 70, s. 148.

[*domini regis amoveantur, et possessio restituetur petenti, salvo jure domini regis*" (q),—which last clause is always added to judgments against the sovereign (r), to whom no laches is ever imputed; and whose right, till some late statutes (s), was never defeated by any limitation or length of time. And by such judgment the Crown is instantly out of possession (t); so that there needs not the indecent interposition of his own officers, to transfer the seisin, from the sovereign, to the party aggrieved.]

II. The methods of redressing such injuries as the Crown may receive from the subject (u), are—

1. [By such usual common law actions, as are consistent with the royal prerogative and dignity. As the sovereign, by reason of his legal ubiquity (x), cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes the dispossession of the plaintiff, such as an ejectment (y): but the Crown may bring a *quare impedit* (z), which always supposes the complainant to be seised or possessed of the advowson; and may prosecute this suit, like every other, as well in the Queen's Bench (a) as the Common Pleas, or in whatever court he pleases. So too the sovereign may bring an action of trespass for taking away his goods, for breaking his close, or other injury done to his soil or possession (b): but such actions (though in strictness maintainable)]

(q) 2 Inst. 695; Rast. Ent. 463.

(r) Finch, L. 460; vide stat. 2 & 3 Edw. 6, c. 8, s. 14.

(s) Vide sup. vol. II. p. 494; sup. vol. III. p. 538.

(t) Finch, L. 459.

(u) Under this head Blackstone comprises the subjects of *mandamus* and *quo warranto*. But these are practically in the nature of remedies at the suit of a private litigant; and in the arrangement of the present work it has been deemed expedient so to class them. Vide sup. bk. v. c. XII.

(x) Vide sup. vol. II. p. 518.

(y) Bro. Ab. tit. Prerog. 89. As to ejectments, vide sup. bk. v. c. XI.

(z) As to *quare impedit*, vide sup. bk. v. c. XI.

(a) Dyversité des Courtes, ch. Bank le Roi. At suit of a subject, a *quare impedit*, (being of the class of real or mixed actions,) can only be brought in the Common Pleas. Vide sup. bk. v. c. XI.

(b) Bro. Abr. tit. Prerog. 130; F. N. B. 90; Y. B. 4 Hen. 4, pl. 4.

are not usually brought at the suit of the Crown. [It would be equally tedious and difficult to run through every minute distinction, that might be gleaned from our antient books with regard to this matter (*c*); nor is it in any degree necessary, as much easier and more effectual remedies are usually obtained by such prerogative modes of process as are peculiarly confined to the Crown.

2. Among these, is that of *inquisition* or *inquest, of office* (*d*): which is an inquiry made by the sovereign's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the Crown to the possession of lands or tenements, goods or chattels (*e*). This is done by a jury of no determinate number; being either twelve, or less, or more. As to inquire whether the Crown's tenant for life died seised, whereby the reversion accrues to the sovereign—whether A., who held immediately of the Crown, died without heir; in which case the land must belong to the sovereign by escheat—whether B. be attainted of treason, whereby his estate is forfeited to the Crown—whether C., who has purchased lands, be an alien, which is another cause of forfeiture—whether D. be an idiot *a nativitate*, and therefore, together with his lands, appertains to the custody of the sovereign; and other questions of like import, concerning both the circumstances of the tenant, and the value or identity of the lands. These inquests of office were more frequently in practice than at present, during the continuance of the military tenures amongst us; when, upon the death of every one of the tenants of the Crown, an inquest of office was held, called an *inquisitio post mortem*, to inquire of what lands he died seised, who was his heir,

(*c*) As to these distinctions, see Attorney General *v.* Lord Churchill, 8 Mee. & W. 172.

(*d*) As to the form of, and proceedings in, an inquisition of office, see Dean *v.* Reginam, 15 Mee. & W. 475; 12 & 13 Vict. c. 109, s. 30, et seq.

(*e*) Finch, L. 323, 425.

[and of what age, in order to entitle the king to his marriage, wardship, relief, *primer seisin*, or other advantage, as the circumstances of the case might turn out (*f*). To superintend and regulate these inquiries, the court of wards and liveries was instituted by statute 32 Hen. VIII. c. 46; which was abolished at the restoration of King Charles the second, together with the oppressive tenures upon which it was founded. With regard to other matters, the inquests of office still remain in force, and are taken upon proper occasions; being extended not only to lands, but also to goods and chattels personal,—as in the case of wreck, treasure trove and the like; and especially as to forfeitures for offences. For every jury which tries a man for treason or felony,—and every coroner's inquest that sits upon a *felo de se*,—is not only with regard to chattels, but also as to real interests, in all respects an inquest of office; and if they find the treason or felony, the sovereign is thereupon, by virtue of this *office found*, entitled to have his forfeitures (*g*).

These inquests of office were devised by law, as an authentic means to give the sovereign his right by solemn matter of record;] it being the rule, that where a common person cannot have possession without entry, the sovereign cannot have it, without an office (*h*);] for it is a part of the liberties of England, and greatly for the safety of the subject, that the sovereign may not enter upon or seize any man's possessions, upon bare surmises, without the intervention of a jury (*i*).] And it is [by the statute 18 Hen. VI. c. 6, enacted, that all letters patent, or grants of lands and tenements, before office found, or returned into the Exchequer, shall be void; and by the Bill of Rights at the Revolution, 1 W. & M. st. 2, c. 2, it is declared, that all grants and promises of fines and forfeitures of particular

(*f*) Vide sup. vol. I. pp. 191—199.

(*g*) As to the inquest on a *felo de se* and the forfeiture to the Crown upon it, see 1 Saund. 275, 362.

(*h*) Chit. Prerog. 249.

(*i*) Sheffeild *v.* Ratcliffe, Hob. 347; Gilb. Hist. Ex. 132.

[persons, before conviction, (which is here the inquest of office,) are illegal and void; which indeed was the law of the land, in the reign of Edward the third (*k*).]

[There are many cases, however, both as regards lands and chattels, in which the Crown is entitled without office found (*l*):] though it is frequent even in such cases to take such inquest, for the better instruction of the officer before seizure: and to protect the subject from the adoption of hasty measures (*m*). Indeed as to personalty, the general rule seems to be, that the Crown is entitled without office or other matter of record (*n*); and it is [particularly enacted by the statute 33 Hen. VIII. c. 20, that in case of attainder for treason, the king shall have the forfeiture instantly without any inquisition of office.] As to the effect of these inquests when taken, it may be laid down as generally true with regard to real property, that if an office be found for the sovereign, and the land be not held at the time by a stranger, it puts the Crown into immediate possession, without the trouble of a formal entry; and the Crown shall receive all the mesne or intermediate profits from the time that its title accrued (*o*). [As on the other hand by the *Articuli super chartas* (*p*), if the king's escheator or sheriff seize lands into the king's hand, without cause, upon taking them out of the king's hand again, the party shall have the mesne profits restored to him]

In order to avoid the possession of the Crown acquired by the finding of such office, the subject may have his petition of right, *monstrans de droit*, or traverse,—according to the distinctions which we have already had occasion to explain (*q*).

3. Upon all debts of record due to the Crown, the sove-

(*k*) 2 Inst. 48.

(*l*) 4 Rep. 58 a.

(*m*) Chit. Prerog. 247, cites Gilb. Exch. 109, 13, 4; 16 Vin. Ab. 79, Office, B.; 12 East, 102.

(*n*) Chit. Prerog. ubi sup.

(*o*) 3 Bl. Com. 260, cites Finch, L. 325, 326.

(*p*) 28 Edw. 1, st. 3, c. 19.

(*q*) Vide sup. pp. 58, 59.

reign has his peculiar remedy by writ of *extent* (*s*); which differs in this respect from an ordinary writ of execution at suit of the subject, that under it the body, lands and goods of the debtor may be all taken at once, in order to compel the payment of the debt (*t*). And this proceeding is called an *extent*, from the words of the writ, which directs the sheriff to cause the lands, goods and chattels to be appraised at their full, or extended, value (*extendi facias*), before they are delivered to satisfy the debt. A debt of record as regards the Crown, is subject in general to the same definition, as in the case where the party to whom it is due is a subject (*u*). But there are several instances in which a debt is so ranked in favour of the Crown, by way of exception from the general rule, and by force of its special prerogative. For, first, it having been provided in the case of debts acknowledged on statute merchant or statute staple, that, upon forfeiture of these, the body, lands and goods might be taken at once in execution (*x*),—it was by 33 Hen. VIII. c. 39, afterwards enacted, among other provisions, that [all obligations made to the king shall have the same force, and of consequence the same remedy, to recover them as a statute staple (*y*).] Moreover, by statute 13 Eliz. c. 4, the lands of all such treasurers, and other officers as therein mentioned, shall be liable to the Crown

(*s*) With respect to debts *not* of record, viz. simple contract debts, and bonds, and other specialties, (not falling within the stat. of 33 Hen. 8, to be presently mentioned in the text,)—no extent can be granted on these, till a commission has first issued, under which an inquisition is taken to find the debt; and when such debt is returned on the inquisition, it becomes a debt on record, on which an extent may issue. (Chit. Prerog. 267.) As to the proceedings on such inquisition, vide R. *v.* Ryle, 9 Mee. & W. 227.

(*t*) 3 Rep. 12 b; Gilb. Ex. 7; 3 Bl. Com. 420; 2 Saund. by Wms 70.

(*u*) Vide sup. vol. II. p. 141.

(*x*) Vide sup. vol. I. p. 308; 2 Saund. 69 b.

(*y*) 3 Bl. Com. 420; R. *v.* Lamb, 3 Price, 649. Whether the general right of the Crown to have execution by extent upon all debts of record, rests upon the provisions of this statute, or on the common law, has been questioned. Vide Bl. Com. (ubi sup.); 3 Rep. 12; Gilb. Ex. 7.

debts due on their accounts, in the same manner as if on the day they first became officers or accountants respectively they had stood bound by writing obligatory having the effect of statute staple (*z*); and by 43 Geo. III. c. 99, s. 41, and 5 & 6 Will. IV. c. 20, s. 13, duties detained in the hands of tax collectors may be recovered as a debt upon record to the Crown, with all costs and charges (*a*).

An extent for recovery of the Crown's debt issues from the Court of Exchequer (*b*), (as the court principally presiding over all matters relating to the royal revenue (*c*)); and directs the sheriff to take an inquisition (or inquest of office) on the oaths of lawful men, to ascertain the lands, goods and debts of the defendant; and to seize the same into the hands of the sovereign, &c.: and it is, in general, necessary that it should be preceded by a *scire facias* (*d*), in order to bring the defendant into court, and afford him an opportunity of showing that it ought not to issue (*e*); though in cases where there is danger of the debt being lost, a baron of the Exchequer may authorize an immediate extent, (*i. e.* an extent without a *scire facias*,) upon affidavit of the circumstances (*f*). The writ having issued, and the inquisition taken, and the seizure made under it by the sheriff, being returned into court (*g*), the defendant, if he means to dispute the debt,—or any third person, who thinks proper to advance a claim to the property set forth in the inquisition,—must enter an appearance in the Court of Exchequer for that purpose; when he will be permitted

(*z*) R. *v.* Rawlings, 12 Price, 834; R. *v.* Fernandez, ibid. 862.

(*a*) R. *v.* Wrangham, 1 Tyrw. 383.

(*b*) By 5 & 6 Vict. c. 86, s. 8, all extents, &c. may bear *teste* and be made returnable on any day certain in term or vacation; and claims to goods seized may be made in vacation, &c.

(*c*) Vide sup. vol. II. p. 536; vol. III. p. 389.

(*d*) Chit. Prerog. 271. As to *scire facias* generally, vide bk. v. c. x. And as to *scire facias* at the suit of the Crown, 12 & 13 Vict. c. 109.

(*e*) Chit. Prerog. 271.

(*f*) Chit. Prerog. 277.

(*g*) The seizure is generally confined to the defendant's lands, chattels and debts. It appears not to be usual to seize the body. Ibid. 282; R. *v.* Plaw, 3 Price, 94.

to plead to the extent. As to the *defendant*, he is allowed by statute 33 Hen. VIII. c. 39, s. 79, to allege or show, in such pleading, any good and sufficient "matter in law, reason, or good conscience," in bar or discharge of the debt: but, as he is found by the inquisition itself to be the owner of the lands and chattels, it is unnecessary for him to claim in his pleading any property in them. If he succeeds in showing matter in bar or discharge of the Crown debt, his right to the property is of course incontestable (*h*). On the other hand, where a *stranger* is let in to plead to the extent, he is not entitled to deny the debt due from the defendant to the Crown: but, by his plea, must show a title in himself, to the lands or chattels; and either traverse, or confess and avoid, that of the Crown,—or, what is the same thing, that of the defendant (*i*). Issue being joined, it is decided either on demurrer, or by trial by jury, pursuant in general to the ordinary course of practice in suits between subject and subject; and is followed by judgment: which, when given for the Crown, is that the subject takes nothing by his traverse or plea; if given for the defendant (or claimant), is an award of *amoveas manus* (*k*). Upon this judgment, error also lies, provided the consent of the attorney-general to that proceeding, be previously obtained (*l*).

With respect to the *effect* of an extent, the lands of a debtor are bound, in general, from the time when the debt becomes one of record (*m*); which, in the case of such bonds as are mentioned in 33 Hen. VIII. c. 39, s. 50, is from the time the bonds are executed. However, even at

(*h*) Chit. Prerog. 367.

(*i*) Chit. Prerog. 368. As to the practice in such cases, see R. *v.* Randall, 5 Price, 576; R. *v.* Lambton, ibid. 421; R. *v.* Soulby, 1 Y. & G. 249.

(*k*) R. *v.* Evans, 6 Price, 480.

(*l*) Chit. Prerog. 373. The property seized under an extent may, if the right of the Crown be established, be sold. The sale of lands is regulated by 25 Geo. 3, c. 35; that of chattels takes place under a writ of *venditioni exponas.*

(*m*) 2 Roll. Ab. 156, B. pl. 1.

common law, debts, (though not of record,) due from certain known public officers and accountants to the Crown, bound the party's *lands* from the time they accrued due; and the 13 Eliz. c. 4, extends the common law exception, by providing that debts due from such officers as are mentioned therein, shall bind their lands from the time when they entered into the offices (*n*). As for the goods of the defendant, they are bound from the *teste* (or date) of the extent (*o*); and the rule seems to be the same as to his debts (*p*). It is also provided by 33 Hen. VIII. c. 39, s. 74, that [the Crown's debt shall, in suing out execution, be preferred to that of every other creditor, who hath not obtained judgment before the Crown commenced its suit (*q*).] On the other hand, however, it is enacted by 2 & 3 Vict. c. 11, that no debt due to the Crown, on judgment, statute, recognizance, inquisition of debt, obligation, or specialty,—nor any acceptance of office, (binding the lands of the officers, as security for arrearages, under the provisions of 13 Eliz. c. 4,)—shall affect any lands, tenements or hereditaments as to purchasers or mortgagees, unless and until such memorandum or minute thereof, as in the Act provided, shall be left with the senior Master of the Court of Common Pleas; who shall forthwith enter the particulars in a book to be intituled "The index to the debtors and accountants to the Crown;" and further, that whenever a *quietus* shall be obtained by a debtor or accountant to the Crown,—and an office copy thereof left with such Master, together with a certificate signed by the

(*n*) Wilde *v.* Forte, 4 Taunt. 334; Chit. Prerog. 294; 3 Bl. Com. 420.

(*o*) Chit. Prerog. 285; 1 Saund. by Wms. 219 g.

(*p*) Ibid. 304; R. *v.* Lambton, 5 Price, 428. As to the effect on partnership property, R. *v.* Saunderson, Wightw. 50; Shears *v.* Lord Advocate, 6 Clarke & Fin. 180.

(*q*) As to the priority of the Crown in cases of extent, see Chit. Prerog. 286; R. *v.* Allnutt, 16 East, 278; R. *v.* Sloper and Allen, 6 Price, 114; 1 Saund. by Wms. 219; 2 Saund. by Wms. 70; Giles *v.* Grover, 9 Bing, 128; 1 Clarke & Fin. 72; R. *v.* Dale, 13 Price, 739; R. *v.* Topping, M'Clel. & Y. 544.

accountant-general, that the same may be registered,—that the Master shall forthwith enter the same in the said book accordingly: and also that it shall be lawful for the lords of the Treasury, (or any three of them,) by writing under their hands,—upon payment of such sums as they shall think fit to require into the receipt of her Majesty's exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the Crown, or upon such other terms as they may think proper,—to certify that any lands, tenements or hereditaments of any such Crown debtor or accountant shall be held by the purchaser or mortgagee, or intended purchaser or mortgagee thereof, wholly exonerated from all further claim of the Crown; or, in cases of leases for fines, to certify that the lessee shall hold the premises exonerated in like manner, without prejudice to the right of the Crown to the reversion upon such lease, and the rents and covenants reserved by the same: and thereupon the same lands, tenements and hereditaments shall respectively be held exonerated as aforesaid.

Such is in general the state of the law relating to the principal kind of extent, called an extent *in chief*. Besides this, however, there is an extent *in aid*, which issues, not at the suit of the Crown, like an extent in chief, but at the suit or instance of the Crown debtor against a person indebted to the Crown debtor himself (*r*); and it is grounded on the Statute of Extent, 33 Hen. VIII. c. 39, and on the principle that the Crown is entitled to the debts due to its debtor. The writ sued out in this case, directs the sheriff (without mention of body, goods or lands) to seize the debts, specialties and sums of money due to the Crown debtor: the effect of which is to cause an inquisition and seizure to be made of such debts for the Crown's use (*s*);

(*r*) As to the persons entitled to extents in aid, vide R. *v.* Gibbs, 7 Price, 633; R. *v.* Tarleton, 9 Price, 647; R. *v.* Kynaston, 11 Price, 598.

(*s*) As to what may be seized, vide

though by consent of the Crown the produce of the extent may be paid over to the Crown debtor, (or prosecutor,) himself. This practice of issuing extents in aid, was at one time carried to so great a length, (particularly by issuing them for larger sums than were in fact due to the Crown from the prosecutor,) as to enable Crown debtors in almost every case to convert to their own benefit a species of execution properly belonging to the Crown; and thereby to obtain an undue preference as regards other creditors; but the resort to extents in aid is now subjected, by 57 Geo. III. c. 117, to restraints which tend to the rectification of this abuse (*t*). There is also a special writ of extent which is issued in the event of the death of a Crown debtor, and is called a *diem clausit extremum* (*u*); because it recites the death of the party. By this writ the sheriff is commanded to inquire by a jury, when and where the Crown debtor died; and what chattels, debts, and land he had at the time of his decease; and to take and seize them into the Crown's hands.

As to the course of proceeding and law relative to an extent in aid, and *diem clausit extremum*, in any particular not above specified,—it is in general similar to that which prevails upon an extent in ordinary cases.

R. *v.* Lushington, 1 Price, 94; R. *v.* Hunter, 4 Price, 258; R. *v.* Lambton, 5 Price, 428.

(*t*) And see a Rule of the Exchequer (22 June, 1822), that no fiat for an extent in aid shall be issued, without affidavit that there will otherwise be danger of the Crown's debt being lost to the Crown. We may remark here, that there is also an extent *in chief in the second degree*, which differs from the extent *in aid* in this—that the first is a proceeding by the Crown *proprio motu* against the debtor of a Crown debtor, against whom also an extent in chief has issued; the latter is where the extent is issued at the instance of a Crown debtor against his debtor, to aid his payment of the Crown debt. The stat. 57 Geo. 3, c. 117, does not apply to extents in chief in the second degree, (See R. *v.* Shackle, 11 Price, 772; Reg. *v.* Adams, 2 Exch. 299.)

(*u*) See Ex parte Hippesley, 2 Price, 379; R. *v.* Hodge, 12 Price, 537; R. *v.* Hassell, M'Clel. 105; R. *v.* Lord Crewe, 5 Dowl. 158.

4. [When the Crown hath unadvisedly granted any thing by letters patent, which ought not to be granted (*x*); or where the patentee hath done some act that amounts to a forfeiture of the grant; the remedy to repeal the patent is by writ of *scire facias*, issued on the common law side of the Court of Chancery (*y*). This may be brought either on the part of the Crown, in order to resume the thing granted: or, if the grant be injurious to a subject, the Crown is bound of right to permit him, (upon his petition,) to use the royal name for repealing the patent, in a *scire facias* (*z*). And so also, if, upon office untruly found for the Crown, it grants the land over to another,—he who is grieved thereby, and traverses the office itself, is entitled before issue joined to a *scire facias* against the patentee, in order to avoid the grant (*a*).

5. An *information* on behalf of the Crown, filed in the Court of Exchequer by the attorney-general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages, for any personal wrong committed in the lands or other possessions of the Crown (*b*). It differs from an information filed in the Court of Queen's Bench,—of which we shall treat in the next Book (*c*),—in that *this* is instituted to redress a private wrong by which the property of the Crown is affected: *that* is calculated to punish some public wrong or heinous misdemeanor in the defendant. It is grounded on no writ under seal, but merely on the intimation of the Crown's officer, the attorney-general, who "gives the court to understand and be informed of" the matter in question; upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are

(*x*) Vide sup. vol. II. p. 33.

(*y*) 3 Lev. 220; 4 Inst. 88.

(*z*) R. *v.* Butler, 2 Ventr. 344. Vide sup. vol. II. p. 33.

(*a*) Bro. Ab. tit. Scire Facias, 69, 185.

(*b*) Yelverton's case, Moor, 375.

(*c*) Vide post, bk. VI. c. XVIII.

[those of intrusion (*d*) and debt (*e*): *intrusion,* for any trespass committed on the lands of the Crown (*f*),—as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber and the like,—and *debt,* for monies due] to the Crown [upon the breach of a penal statute (*g*). This is most commonly used to recover forfeitures occasioned by transgressing those laws which are enacted for the establishment and support of the revenue; others, which regard mere matters of police and public convenience, being usually left to be enforced by common informers, in the *qui tam* informations and actions of which we have formerly spoken (*h*). But after the attorney-general has informed upon a breach of the penal law, no other information can be received (*i*). There is also an information *in rem,* when any goods are supposed to become the property of the Crown, and no man appears to claim them or to dispute its title;—as antiently in the case of treasure-trove, wrecks, waifs, and estrays, seized] by the Crown's officer for its use. [Upon such seizure an information was usually filed in the Exchequer, and thereupon a proclamation was made for the owner, (if any,) to come in and claim the effects: and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands: after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the

(*d*) Vide 4 Rep. 58 a; Attorney-General *v.* Parsons, 2 M. & W. 23; Attorney-General *v.* Hill, ibid. 160.

(*e*) Vide Attorney-General *v.* Sewell, 4 Mee. & W. 77.

(*f*) Nannge *v.* Rowland ap Ellis, Cro. Jac. 212; Lord Vaux's case, 1 Leon. 49. In this proceeding the Crown has not a right to lay the venue in any county it pleases, as it has in personal actions. (Attorney-General *v.* Lord Churchill, 8 Mee. & W. 171.) As to information of intrusion in respect of a royal forest, see Attorney-General *v.* Hallett, 1 Exch. 211.

(*g*) See 41 Geo. 3, c. 90, as to enforcing, in Ireland, payment of Crown debts recovered in England, and *vice versâ.*

(*h*) Vide sup. bk. v. c. XII.

(*i*) Hard. 201.

[use of the Crown (*k*). And when in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise,—the same process was adopted in order to secure such forfeited goods to the public use, though the offender himself had escaped the reach of justice.]

Finally, we may remark, that, in all informations and other legal proceedings by or on behalf of the Crown in matters relating to the public revenue, the *costs* are now, by 18 & 19 Vict. c. 90, ss. 1, 2, placed upon the same footing as in ordinary actions between subject and subject (*l*); but that, as the general rule, as it stands independently of this statute, the Crown neither pays nor receives costs (*m*).

[We have now gone through the whole circle of civil injuries, and the redress which the laws of England have anxiously provided for each. In which the student cannot but observe, that the main difficulty which attends their discussion, arises from their great variety; which is apt at our first acquaintance to breed confusion of ideas, and a kind of distraction in the memory. A difficulty not a little increased by the very immethodical arrangement in which they are delivered to us by our antient writers, and the numerous terms of art in which the language of our ancestors has obscured them:] for [terms of art, there will un-

(*k*) Gilb. Hist. Exch. c. 13.

(*l*) By the same statute (sect. 3), the Barons of the Exchequer are empowered to make general rules for the regulation of the pleading and practice in informations and other proceedings by or on behalf of the Crown, with a view to its assimilation, as nearly as possible, to the pleading and practice between subject and subject. In Blackstone's opinion, (see Bl. Com. vol. 3, p. 400,) "it seems reasonable to "suppose, that a queen consort par-"ticipates in this privilege of the "Crown as regards costs."

(*m*) See 24 Hen. 8, c. 8; 3 Bl. Com. 400; 25 Geo. 3, c. 35; Attorney-General *v.* Shillibeer, 4 Exch. 606.

[avoidably be in all sciences; the easy conception and thorough comprehension of which must depend upon frequent and familiar use; and the more subdivided any branch of science is, the more terms must be used to express the nature of these several subdivisions, and mark out with sufficient precision the ideas they are meant to convey. But this difficulty, however great it may appear at first view, will shrink to nothing upon a nearer and more frequent approach; and indeed be rather advantageous than of any disservice, by imprinting on the mind a clear and distinct notion of the several remedies. And, such as it is, it arises principally from the excellence of our English laws; which apply their redress exactly to the circumstances of the injury, and do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same description; whereby every man knows what satisfaction he is entitled to expect from the courts of justice; and as little as possible is left in the breast of the judges, whom the law appoints to administer, and not to prescribe, the remedy.]

BOOK VI.

OF CRIMES.

CHAPTER I.

OF THE NATURE OF CRIMES AND THEIR PUNISHMENTS.

We are now arrived at the sixth and last branch of the Commentaries; which treats of *public wrongs*, or *crimes*. For it will be remembered that wrongs were divided into two species; the one *private*, and the other *public* (*a*). Private wrongs, otherwise termed *civil injuries*, were the subject of the preceding Book. We are now, therefore, lastly, to proceed to the consideration of public wrongs or crimes, in pursuit of which we shall consider, [in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crimes; thirdly, their several degrees of guilt as principals or accessories; fourthly, the several species of crimes, with the punishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and, sixthly, the method of inflicting those punishments which the law has annexed to each crime respectively.

First, as to the general nature of crimes and their punishment: the discussion and admeasurement of which forms, in

(*a*) Vide sup. vol. I. p. 136.

[every country, the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the "*pleas of the crown*," so called because the sovereign,—in whom centres the majesty of the whole community,—is supposed by the law to be the person injured] by every wrong done to that community; [and is therefore, in all cases, the proper prosecutor for every such offence.

The knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees, of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For, as a very great master of the Crown law (*b*) has observed upon a similar occasion, no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events which the compass of a day may bring forth, will teach us (upon a moment's reflection), that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded on principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes, (provided there be no transgression of these eternal boundaries,) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the State which it is meant to govern: and yet,] it is remarked by Sir W. Blackstone (*c*), [that either

(*b*) Sir Michael Foster, pref. to Rep.

(*c*) 4 Bl. Com. 3.

[from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition and revenge; or from retaining the discordant political regulations which successive conquerors or factions have established in the various revolutions of government; or from giving a lasting efficacy to sanctions that were intended to be temporary, and made, (as Lord Bacon expresses it,) merely upon the spur of the occasion; or, lastly, from too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence;—from some or from all of these causes it hath happened, that the criminal law is, in every country of Europe, more rude and imperfect than the civil.] And he observes, that [even with us in England, where our Crown law is, with justice, supposed to be more nearly advanced to perfection; where crimes are more accurately defined and penalties less uncertain and arbitrary; where all our trials are in the face of the world; where torture is unknown, and every delinquent is judged by such of his equals against whom he can form no exception, nor even a personal dislike:—even here we shall occasionally find room to remark some particulars that seem to want revision or amendment (*d*).] The justice of which complaints has been strikingly illus-

(*d*) If bills, introductory of new penal enactments, were first referred to some of the learned judges before they were entertained in parliament, it is impossible, (says Blackstone vol. iv. p. 4,) "that in the eighteenth "century it could ever have been "made a capital crime to break "down, however maliciously, the "mound of a fish pond whereby any "fish shall escape; or to cut down "a cherry tree in an orchard; as pro- "vided respectively by stat. 9 Geo. 1, "c. 22; 31 Geo. 2, c. 42. And were "even a committee appointed but "once in 100 years to revise the cri- "minal law, it could not have con- "tinued to this hour a capital felony "to be seen for one month in the com- "pany of persons who called them- "selves, or are called, Ægyptians; "as provided by 1 Ph. & M. c. 4, "and 5 Eliz. c. 20." It is scarcely necessary to remark, that all these sanguinary laws are now repealed. As to the two first mentioned offences the repeal is by 4 Geo. 4, c. 44, and 7 & 8 Geo. 4, c. 30, ss. 15, 19; as to the last, by 23 Geo. 3, c. 51, and 1 Geo. 4, c. 116.

trated by the many signal reforms in the criminal law, which since his time the legislature has found reason to introduce: and even now no candid commentator on our laws can pronounce a quite unmixed encomium on this part of our juridical system. [We shall proceed now to consider, in the first place, the general nature of crimes:] and this as regards, first, the crime itself; and, secondly, the punishment.

I. A crime is the violation of a right; when considered in reference to the evil tendency of such violation, as regards the community at large (*e*).

[The distinction of public wrongs from private—of crimes from civil injuries—seems upon examination principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are] a violation of the same rights, considered in reference to their effect on the community in its aggregate capacity (*f*); [as if I detain a field from another man to which the law has given him a right,—this is a civil injury and not a crime: for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land: but treason, murder and robbery are properly ranked

(*e*) The definition of Blackstone is as follows: "A crime or misdemeanor is an act committed or "omitted, in violation of a public "law either forbidding or commanding it."—4 Bl. Com. p. 5. But this scarcely points out the difference between a crime and a civil injury.

(*f*) The expression of Blackstone here is, "A breach and violation of "the public rights and duties due to "the whole community, considered "as a community in its social and "aggregate capacity."—4 Bl. Com. p. 5. We are thus presented with another definition of crime; but it is not more satisfactory than the first, for it merely raises the question of what is meant by "public "rights due to the community?" If the expression is intended to exclude *private* right due to the individual, the definition seems wrong, for a violation of such rights as these, clearly amounts to a crime; as in the case of a murder or battery.

[among crimes; since, besides the injury done to individuals, they strike at the very being of society; which cannot possibly subsist where actions of this sort are suffered to escape with impunity. In all cases crime includes an injury: every public offence is also a public wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus treason in imagining the sovereign's death, involves in it conspiracy against an individual, which is also a civil injury; but as this species of treason in its consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society,—this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual: but the law of society considers principally the loss which the State sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view: it is an injury to *private* property; but were that all, a civil satisfaction in damages might atone for it: the *public* mischief is the thing, for the prevention of which our laws have made it a] felonious (*g*) [offence. In these gross and atrocious injuries, the private wrong is swallowed up in the public. We seldom hear any mention made of satisfaction to the individual, the satisfaction to the community being so very great (*h*). And indeed as the public crime is not otherwise avenged than by forfeiture of life or property, it is,] in many instances, [impossible afterwards to make any reparation for the private wrong; which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature in which the public punishment is not so severe; and herein the distinction of crimes from civil injuries is very apparent. For instance, in the case of

(*g*) The expression in Blackstone is "a *capital* offence;" but robbery is not now capital, unless attended with wounding, &c. Vide 7 Will. 4 & 1 Vict. c. 87, et post, c. v.

(*h*) There still exists, however, a remedy for the private wrong; even in cases of felony it is only *suspended* during the prosecution for the crime.

[battery or beating another, the aggressor may be indicted for this, at the suit of the Crown, for disturbing the public peace; and be punished criminally by fine and imprisonment: and the party beaten may also have his private remedy by action of trespass, for the injury which he in particular sustains; and recover a civil satisfaction in damages. So also in case of a public nuisance,—as digging a ditch across a highway; this is punishable by indictment as a common offence to the whole kingdom and all Her Majesty's subjects; but if any individual sustains any special damage thereby,—as laming his horse, breaking his carriage, or the like,—the offender may be compelled to make ample satisfaction, as well for the private injury as for the public wrong.

Upon the whole we may observe, that, in taking cognizance of all wrongs or unlawful acts, the law has a double view, viz. not only to redress the party injured, by either restoring to him his right (if possible), or by giving him an equivalent,—the manner of which was the object of our inquiries in] the fifth [Book of these Commentaries; but also to procure to the public the benefit of society, by preventing or punishing every breach or violation of those laws which the sovereign power has thought proper to establish for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present Book.]

In ordinary language we understand, when we speak of crimes, such only as are subjects for *indictment*,—a proceeding of which we shall have occasion to speak hereafter; for such breaches of law as are punishable merely by a pecuniary penalty recoverable on a summary conviction before a justice of the peace, and not indictable, are not usually designated as crimes, but by the more general term of offences. Crimes thus understood consist either of *misdemeanors* or *felonies* (*i*). The term *mis-*

(*i*) In order to prevent any failure of justice by reason o this technical distinction, it is provided by 14 & 15 Vict. c. 100, s. 12, that if upon the

demeanor (*k*) is, properly speaking, synonymous with that of crime; though in common usage, the word is made to denote such crimes as amount not to *felonies.* Into the nature and meaning of the latter denomination, it will be expedient to enter a little more at large.

[Felony, in the general acceptation of our English law, comprises every species of crime, which occasioned at common law the forfeiture of lands and goods. Treason itself, says Sir Edward Coke (*l*), was antiently comprised under the name of felony; and in confirmation of this we may observe that the statute of treasons, (25 Edw. III. c. 2,) speaking of some dubious crimes, directs a reference to parliament, that it may be there adjudged, "whether they be treason or *other* felony." All treasons, therefore, strictly speaking, are felonies, though all felonies are not treason.

And to this also we may add, that not only all offences, now capital, are in some degree or other felony, but that this is likewise the case with] many [other offences which are not punishable with death; as suicide, where the party is already dead;] manslaughter; and larceny; all which are [felonies, as they subject the committers of them to forfeitures. So that, upon the whole, the only adequate definition of felony seems to be that which is before laid down; viz. an offence which occasions a total forfeiture of either lands or goods (or both) at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt.

To explain this matter a little further: the word *felony*, or *felonia*, is of undoubted feudal original, being frequently to be met with in the books of feuds, &c.; but the derivation of it, has much puzzled the juridical lexicographers Prateus, Calvinus, and the rest; some deriving it from the

trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor.

(*k*) As to the technical force of the word "misdemeanor" in an indictment, See R. *v.* Powell, 2 B. & Ad. 75; Ryalls *v.* The Queen, 11 Q. B. 794.

(*l*) 3 Inst. 15.

[Greek φηλος, an impostor or deceiver; others from the Latin *fallo, fefelli,* to countenance which they would have called it *fallonia.* Sir E. Coke, as his manner is, has given us a still stranger etymology (*m*),—that it is *crimen animo felleo perpetratum,* with a bitter or gallish inclination. But all of them agree in the description that it is such a crime, as occasions a forfeiture of all the offender's lands or goods. And this,] as Sir W. Blackstone observes (*n*), [gives great probability to Sir H. Spelman's Teutonic or German derivation of it (*o*); in which language indeed, (as the word is clearly of feudal origin,) we ought rather to look for its signification than among the Greeks and Romans.

Fe-lon, then, according to Spelman, is derived from two northern words: **fee,** which signifies, we well know, the fief, feud, or beneficiary estate; and **lon,** which signifies price or value. Felony (*p*) is therefore the same as *pretium feudi;* the consideration for which a man gives up his fief; as we say, in common speech, such an act is as much as your life or estate is worth. In this sense it will clearly signify the feudal forfeiture, or act by which an estate is forfeited or escheats to the lord.

To confirm this we may observe, that it is in this sense of forfeiture to the lord, that the feudal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeiture of copyhold estates (*q*), are styled *felonia* in the feudal law: "*scilicet per quas feodum amittitur* (*r*)." As "*si domino deservire noluerit* (*s*); *si per annum et diem cessaverit in petendâ investiturâ* (*t*); *si dominum ejuraverit, i. e. negaverit se a domino feudum habere* (*u*); *si a domino, in jus eum vocante, ter citatus non comparuerit* (*x*):" all these, with many others,

(*m*) 1 Inst. 391.

(*n*) 4 Bl. Com. 95.

(*o*) Gloss. tit. Felon.

(*p*) As to the technical force of the word "felony" in an indictment, see Campbell *v.* The Queen, 11 Q. B. 799.

(*q*) Vide sup. vol. I. p. 626.

(*r*) Feud. l. ii. t. 16, in calc.

(*s*) Ibid. l. i. t. 21.

(*t*) Ibid. l. ii. t. 24.

(*u*) Ibid. l. ii. t. 34; l. ii. t. 26, s. 3.

(*x*) Ibid. l. ii. t. 22.

[are still causes of forfeiture in our copyhold estates; and were denominated felonies, by the feudal constitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures; as assaulting or beating the lord (*y*), or vitiating his wife or daughter, "*si dominum cucurbitaverit, i. e. cum uxore ejus concubuerit* (*z*): all these are esteemed felonies, and the latter is expressly so denominated: *si fecerit feloniam, dominum forte cucurbitando* (*a*)." And as these contempts or smaller offences were felonies or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand, the lord might be guilty of felony, or forfeit his seigniory to the vassal, by the same acts as the vassal would have forfeited his feud to the lord: "*si dominus commiserit feloniam, per quam vasallus amitteret feudum si eam commiserit in dominum, feudi proprietatem etiam dominus perdere debet* (*b*)." One instance given of this sort of felony in the lord, is beating the servant of his vassal, so that he loses his service; which seems merely in the nature of a civil injury, so far as it respects the vassal. And all these felonies were to be determined "*per laudamentum sive judicium parium suorum*" in the lord's court; as with us forfeitures of copyhold lands, are presentable by the homage in the court baron.

Felony, and the act of forfeiture to the lord, being thus synonymous terms in the feudal law, we may easily trace the reason why,—upon the introduction of that law into England,—those crimes which induced such forfeiture or escheat of lands,—and, by a small deflexion from the original sense, such as induced the forfeiture of goods also,—were denominated felonies. Thus it was said that suicide, robbery, and rape, were felonies; i. e. the consequence of such crimes was forfeiture; till, by long use, we began to signify by the term of felony the actual crime committed, and not the penal consequence.

(*y*) Feud. l. ii. t. 24, s. 2.
(*z*) Ibid. l. i. t. 5.
(*a*) Ibid. l. ii. t. 38; Britton, l. i. c. 22.
(*b*) Ibid. l. ii. t. 26, 47.

[Hence it follows, that capital punishment does by no means enter into the true idea and definition of felony (c). Felony may be without inflicting capital punishment, as in the cases instanced of self-murder,] manslaughter, and larceny: [and it is possible that capital punishment may be inflicted, and yet the offence be no felony: as in the case of heresy, by the common law (d); which, though capital, never worked any forfeiture of lands or goods (e), an inseparable incident to felony. And of the same nature was the] antient [punishment for standing mute without pleading to an indictment: which at the common law was capital, but without any forfeiture; and therefore such standing mute was no felony. In short the true criterion of felony is forfeiture;] and accordingly, to this day, all felonies, punishable with death, occasion a forfeiture to a greater or less extent of the lands of the offender, and the total forfeiture of his goods and chattels; and even such as are not so punishable, the total forfeiture of his goods and chattels (*f*).

II. The nature of crimes in general being thus ascertained and distinguished, we proceed in the next place to consider the [general nature of *punishments*; which are evils or inconveniences consequent on crimes and misdemeanors; being devised, denounced, and inflicted by human laws in consequence of disobedience, or misbehaviour, in those to regulate whose conduct such laws were respectively made.

(c) At common law, however, the idea of felony was in general connected with that of capital punishment; "and therefore," says Blackstone, "if a statute makes any new "offence felony, the law implies that "it shall be punished with death, "viz., by hanging, as well as with "forfeiture, unless the offender prays "the benefit of clergy, which all "felons are entitled once to have, "provided the same is not expressly "taken away by statute." (4 Bl. Com. 98.) As to benefit of clergy (now abolished), vide post, c. XXIII.

(d) But heresy is now only punishable in the ecclesiastical courts, *pro salute animæ*. (Vide sup. vol. III. p. 48.)

(e) 3 Inst. 43.

(*f*) See the present state of the law on this subject, post, c. XXIII.

[And herein we will briefly consider the *power*, the *end* and the *measure* of human punishments.

I. As to the *power* of human punishment; or the right of the temporal legislator, to inflict discretionary penalties for crimes and misdemeanors (*g*). It is clear that the right of punishing crimes against the law of nature,—as murder and the like,—is in a state of mere nature vested in every individual. For it must be vested in *somebody*, otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution; and if that power is vested in any *one*, it must also be vested in *all* mankind, since all are by nature equal. Whereof the first murderer Cain, was so sensible, that we find him expressing his apprehensions, that *whoever* should find him would slay him (*h*). In a state of society, this right is transferred from individuals to the sovereign power: whereby men are prevented from being judges in their own causes, which is one of the evils which civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community; and to this precedent natural power of individuals, must be referred that right which some have argued to belong to every state (*i*), of punishing not only their own subjects, but also foreign ambassadors, even with death itself, in case they have offended —not indeed against the municipal laws of the country, but—against the divine laws] or laws of nature, [and have become liable thereby to forfeit their lives for their guilt.

As to offences merely against the laws of society, which are only *mala prohibita* and not *mala in se* (*k*), the tem-

(*g*) See Grotius, De J. B. et P. l. 2, c. 20; Puff. L. of Nat. and N. b. 8, c. 3.

(*h*) Gen. iv. 14.

(*i*) Blackstone adds, (vol. iv. p. 8,) "though in fact never exercised by "any." Vide sup. vol. II. p. 499, n. (*q*), as to the case of Don Pataleon Sa, the brother and secretary of the Portuguese ambassador.

(*k*) As to this distinction, vide sup. vol. I. pp. 36, 39; vol. II. p. 498.

[poral magistrate is also empowered to inflict coercive penalties for such transgressions: and this by the consent of individuals; who, in forming societies, did either tacitly or expressly invest the sovereign power with a right of making laws, and of enforcing obedience to them when made, by exercising upon their non-observance severities adequate to the evil.

The lawfulness, therefore, of punishing such criminals is founded upon this principle,—that the law by which they suffer was made by their own consent. It is a part of the original contract into which they entered when first they engaged in society (*l*); it was calculated for, and has long contributed to, their own security.

This right, therefore, being thus conferred by universal consent, gives to the State exactly the same power, and no more, over all its members, as each individual member had naturally over himself or others; which has occasioned some to doubt, how far a human legislature ought to inflict capital punishments for *positive* offences against the municipal law only, and not against the law of nature; since no individual has naturally a power of inflicting death upon himself or others, for actions in themselves indifferent. With regard to offences *mala in se*, capital punishments are in some instances inflicted by the immediate *command* of God himself to all mankind; as, in the case of murder, by the precept delivered to Noah (*m*), (their common ancestor and representative,) "Whoso sheddeth man's blood by man shall his blood be shed." In other instances, they are inflicted after the *example* of the Creator in his positive code of laws for the regulation of the Jewish republic,—as in the case of the crime against nature.] And they have also been [sometimes inflicted without such express warrant or example, at the will and discretion of the human legislature,] and even for offences which are *mala prohibita* only, as for forgery or for offences of a lighter kind. But as regards mere *mala prohibita*, and indeed all cases whatever,

(*l*) Vide sup. vol. i. p. 30. (*m*) Gen. ix. 6.

where there is no scriptural authority for the infliction, capital punishment, (supposing it to be lawful at all (*n*),) is a sanction never to be resorted to by the legislature, without the utmost circumspection. It may be safely laid down in reference to this subject, that [it is the enormity or dangerous tendency of the crime, that alone can warrant any earthly legislature in putting him to death that commits it. It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For though the end of punishment is to deter men from offending, it never can follow from thence that it is lawful to deter them at any rate, and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws.] It is manifest that [where the evil to be prevented, is not adequate to the violence of the preventive, a ruler that thinks seriously, can never justify such a law to the dictates of conscience and humanity. To shed the blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority. For life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of Him who gave it; either expressly revealed, or collected from the laws of nature or society, by clear and indisputable demonstration.

2. As to the *end*, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the Supreme Being; but as a precaution against future offences of the same kind. This is effected three ways;

(*n*) Blackstone seems neither to deny, nor to admit, the right of the legislature to inflict death in the case of mere *mala prohibita*; (vide 4 Bl. Com. 11;) but justly remarks, that if there is no right to inflict it, "the "guilt of blood must lie at the door "of the legislature, who misinter-"pret the extent of their warrant; "and not at the door of the subject, "who is bound to receive the inter-"pretations that are given by the "sovereign power."—Ibid.

[either by the amendment of the offender himself, for which purpose all corporal punishment, fines, and temporary exile or imprisonment are inflicted : or by deterring others, by the dread of his example, from offending in the same way, "*ut pœna* (as Tully expresses it) *ad paucos, metus ad omnes perveniat*" (*o*); which gives rise to all ignominious punishments, and to such executions of justice as are open and public : or lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. The same one end of preventing future crimes, is endeavoured to be answered by each of these three modes of punishment. The public gains equal security, whether the offender himself be amended by wholesome correction, or whether he be disabled from doing any future harm; and if the penalty fails of both these effects, (as it may do,) still the terror of his example remains as a warning to other citizens. The method however, of inflicting punishment, ought always to be proportioned to the particular purpose it was meant to serve, and by no means to exceed it; therefore the pains of death and of perpetual exile, slavery, or imprisonment, ought never to be inflicted but where the offender appears incorrigible; which may be collected either from a repetition of minuter offences, or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment; and in such case it would be cruelty to the public to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps one of the worst of villanies.

3. As to the *measure* of human punishments. From what has been observed in the former articles, we may collect that the quantity of punishment can never be absolutely determined by any invariable rule; but it must be

(*o*) Pro Cluentio, 46.

[left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear best calculated to answer the end of precaution against future offences.

Hence it will be evident that what some have so highly extolled for its equity, the *lex talionis*, (or law of retaliation,) can never be, in all cases, an adequate or permanent rule of punishment. In some cases, indeed, it seems to be dictated by natural reason; as in the cases of conspiracies to do an injury, or false accusations of the innocent (*p*); to which we may add the law of the Jews and Egyptians mentioned by Josephus and Diodorus Siculus,—that whoever, without sufficient cause, was found with any mortal poison in his possession, should himself be obliged to take it. But in general the difference of persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see that, if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may sometimes be too easy a sentence; as if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his; and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered, by decreeing, (in imitation of Solon's laws (*q*),) that he who struck out the eye of a one-eyed man, should lose both his own in return. Besides, there are very many crimes that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like; and we may add that those instances wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact re-

(*p*) Pott. Ant. b. 1, c. 26.

(*q*) Ibid.

[tribution, by doing to the criminal the same hurt he has done to his neighbour, and no more; but this correspondence between the crime and punishment, is a consequence from some other principle.] Death is punished with death, as the appropriate manner of visiting an offence of the highest enormity, but not as an equivalent; [for that would be expiation and not punishment. Nor is death always an equivalent for death; the execution of a needy decrepit assassin, is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours and his fortune. But the reason on which this sentence is grounded seems to be, that this is the highest penalty that man can inflict; and tends most to the security of mankind, by removing one murderer from the earth, and setting a dreadful example to deter others; so that even this grand instance, proceeds upon other principles than those of retaliation.]

We may remark that [it was once attempted to introduce into England the law of retaliation, as a punishment for such only as preferred malicious accusations against others; it being enacted by stat. 37 Edw. III. c. 18, that such as preferred any suggestions to the king's great council, should put in sureties of taliation; that is, to incur the same pain that the other should have had, in case the suggestions were found untrue. But, after one year's experience, this punishment of taliation was rejected; and imprisonment adopted in its stead (*r*).

But, though from what has been said, it appears that there cannot be any regular or determinate method, of rating the quantity of punishment for crimes by any one uniform rule; but they must be referred to the will and discretion of the legislative power; yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in alloting to it an adequate punishment.

As, first, with regard to the object of it: for the greater

(*r*) Stat. 38 Edw. 3, c. 9.

[and more exalted the object of an injury is, the more care should be taken to prevent that injury; and of course, under this aggravation, the punishment should be more severe. Therefore treason, in conspiring the king (or queen's) death, is by the English law punished with greater rigour than even actually killing any private subject (*s*); and yet, generally, a design to transgress, is not so flagrant an enormity as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking; so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it: and it is an encouragement to repentance and remorse, even till the last stage of any crime, that it is never too late to retract; and that if a man stops even here, it is better for him than if he proceeds:] for which reason an attempt to commit a felony, is in general far less penal than the actual felony. [But in the case of a treasonable conspiracy, the object whereof is the king (or queen's) majesty, the bare intention,] where there is anything in the conduct of the parties to prove that it was entertained by them, will, (if manifested by any kind of overt act,) [deserve the highest degree of severity; not because the intention is equivalent to the act itself, but because the greatest rigour is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself.

Again: the violence of passion or temptation may sometimes alleviate a crime; as theft, in case of hunger, is far more worthy of compassion than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment, is less penal than upon cool deliberate malice. The age, education, and character of the offender; the repetition, (or otherwise,) of the offence; the time, the place, the company wherein it

(*s*) In Blackstone's time the punishment for treason involved some extreme severities. It is, even at the present day, more severe than in the case of murder. (Vide post, c. VI.)

[was committed—all these, and a thousand other incidents, may aggravate or extenuate the crime (*t*).

Further: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures, those should be most severely punished which are the most destructive of the public safety and happiness (*u*); and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing; which cannot be so easily guarded against as others; and which, therefore, the offender has the strongest inducement to commit, according to what Cicero observes (*x*), "*ea sunt animadvertenda peccata maximè, quæ difficillimè præcaventur.*"]

Hence it is, that to steal a handkerchief or other trifle privately from one's person, is punishable with penal servitude for from ten to fifteen years, or imprisonment for three years (*y*); but to carry off a load of corn from an open field, though of fifty times greater value, is punished with penal servitude for three years only, or with imprisonment for two years (*z*). [And in the Island of Man this rule was formerly carried so far, that to take away an ox or on ass was there no felony, but a trespass; because of the difficulty, in the little territory, to conceal them or carry them off; but to steal a pig or a fowl, (which is easily done,) was a capital crime, and the offender punishable with death (*a*).

Lastly, as a conclusion to the whole, we may observe, that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing

(*t*) Thus Demosthenes (in his oration against Midias) finely works up the aggravation of the insults he had received :—"I was abused," says he, "by my enemy in cold blood, "out of malice, not by heat of wine, "in the morning, publicly, before "strangers, as well as citizens; and "that in the temple, whither the "duty of my office called me."

(*u*) Beccar. c. 6.

(*x*) Pro Sexto Roscio, 40.

(*y*) 7 Will. 4 & 1 Vict. c. 87, s. 5; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*z*) 7 & 8 Geo. 4, c. 29, s. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*a*) 4 Inst. 285.

[crimes and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action (*b*), that crimes are more effectually prevented by the *certainty* than by the *severity* of punishment. For the excessive severity of laws (says Montesquieu (*c*)) hinders their execution: when the punishment surpasses all measure, the public will frequently, out of humanity, prefer impunity to it. Thus, also, the stat. 1 Mary, st. 1, c. 1, recites in its preamble, "that the state "of every king consists more assuredly in the love of the "subject towards their prince, than in the dread of laws "made with rigorous pains; and that laws made for the "preservation of the commonwealth, without great penal- "ties, are more often obeyed and kept than laws made "with extreme punishments." Happy had it been for the realm, if the subsequent practice of that deluded princess, in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of state and government. We may further observe that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished;—under the emperors severe punishments were revived—and then the empire fell.

It is, moreover, absurd and impolitic, to apply the same punishments to crimes of different malignity. A multitude of sanguinary laws, (besides the doubt that may be entertained concerning the right of making them,) do likewise prove a manifest defect in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill,

(*b*) Beccar. c. 7. (*c*) Sp. L. b. 6. c. 13.

[to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind; yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which, through ignorance or indolence, he will not attempt to cure. It has been, therefore, ingeniously proposed (*d*), that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least; but if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank. Where men see no distinction in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt (*e*).]

(*d*) Beccar. c. 6.

(*e*) Blackstone concludes these remarks with some just invectives on that frequency of capital punishment, which disgraced the English law at the time he wrote. He says, "It is a melancholy truth that "among the variety of actions which "men are daily liable to commit, no "less than 160 have been declared "by act of parliament to be felonies "without benefit of clergy, or, in "other words, to be worthy of in-"stant death. So dreadful a list, "instead of diminishing, increases "the number of offenders. The in-"jured, through compassion, will "often forbear to prosecute; juries, "through compassion, will some-"times forget their oaths, and either "acquit the guilty or mitigate the "nature of the offence; and judges, "through compassion, will respite "one-half of the convicts, and re-"commend them to the royal mercy. "Among so many chances of escape, "the needy and hardened offender "overlooks the multitude that suffer; "he boldly engages in some despe-"rate attempt to relieve his wants "or supply his vices; and if unex-"pectedly the hand of justice over-"take him, he deems himself pecu-"liarly unfortunate in falling at last "a sacrifice to those laws, which long "impunity has taught him to con-"temn."—4 Bl. Com. 18.

This exposure of the impolicy as well as inhumanity of our system in regard to punishment, might well have led to its earlier amendment. That reform, which is mainly due to the exertions of Sir Samuel Romilly towards the close of the reign of George the third, may now be said to be complete; but it owes its consummation to the reign of our present gracious sovereign.

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.



[HAVING in the preceding chapter considered in general the nature of crimes and punishments, we are next led in the order of our distribution to inquire what persons are or are not *capable* of committing crimes; or which is the same thing, who are exempted from the censures of the law, upon the commission of those acts which in other persons would be severely punished. In the process of which inquiry we must have recourse to particular and special exceptions; for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

All the several pleas and excuses which protect the committer of a forbidden act, from the punishment which is otherwise annexed thereto, may be reduced to this single consideration,—the want or defect in *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. For though, *in foro conscientiæ*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it,] yet in general, and except in the rare case in which the party confesses such a design, no temporal tribunal has any means of discovering its existence, where

it has not been carried out into an external action. It is besides impossible, in any case, to ascertain that conscience might not possibly have recovered its power in time to prevent the actual perpetration of the offence; for which reasons, [in all temporal jurisdictions, an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

Now there are three cases in which the will does not join with the act. I. Where there is a defect of understanding. For where there is no discernment there is no choice; and where there is no choice there can be no act of the will, which is nothing else than a determination of one's choice to do or to abstain from a particular action; he therefore that has no understanding can have no will to guide his conduct. II. Where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done; which is the case of all offences, committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act or disagrees to it. III. Where the action is constrained by some outward force and violence. Here the will counteracts the deed; and is so far from concurring with, that it loathes and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads; as infancy, idiotcy, lunacy and intoxication, which fall under the first class; misfortune and ignorance, which may be referred to the second; and compulsion or necessity, which may properly rank in the third.]

I. Under the first division we will first consider the case of *infancy* or non-age; [which is a defect of the understanding. Infants under the age of discretion, ought not to be punished by any criminal prosecution whatever (*a*). What the age of discretion is, in various nations, is matter of some variety. The civil law has distinguished the age of minors,—or those under twenty-five years old,—into three stages: *infantia*, from the birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upwards. The period of *pueritia*, (or childhood,) was again subdivided into two equal parts; from seven to ten and a half, was *ætas infantiæ proxima:* from ten and a half to fourteen, was *ætas pubertati proxima.* During the first stage of infancy, and the next half stage of childhood, *infantiæ proxima*, minors were not punishable for any crime (*b*) During the other half stage of childhood, (approaching to puberty,) from ten and a half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief; but with many mitigations, and not with the utmost rigour of the law (*c*). During the last stage, (of the age of puberty, and afterwards,) minors were liable to be punished, as well capitally as otherwise.

The law of England does in some cases, privilege an infant under the age of twenty-one, as to common misdemeanors; so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge or a highwhay, or other similar offences (*d*); for not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires (*e*). But where there is any notorious breach of the peace, a riot, battery or the like (which infants, when full grown, are at least as liable as others to commit),] or

(*a*) Hawk, P. C. b. 1, c. 1, s. 2.

(*b*) Inst. 3, 20, 10.

(*c*) Ff. 29, 5, 14, 50, 17, 111, 47, 2, 23.

(*d*) 1 Hale, P. C. 20, 21, 22.

(*e*) As to the state of the law on the subject of infancy, in general, vide sup. vol. II. p. 307.

any perjury or cheating (*f*);—[for these an infant above the age of fourteen is equally liable to suffer, as a person of the full age of twenty-one.

With regard to capital crimes the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the antient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open (*g*). And from thence until fourteen, it was *ætas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion; but, under twelve, it was held that he could not be guilty in will, neither after fourteen could be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another at fourteen; and in these cases our maxim is that "*malitia supplet ætatem.*" Under seven years of age, indeed, an infant cannot be guilty of felony (*h*), for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony (*i*). Also under fourteen, though an infant shall be *primâ facie* adjudged to be *doli incapax* (*k*); yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death.] Thus besides more antient examples (*l*) [there was an instance where a boy of eight years old was tried] in the seventeenth century [at Abingdon for firing two barns; and it appearing that he had malice, cunning, and

(*f*) Bac. Ab. Infancy, H.

(*g*) Wilk. Leg. Ang.-Sax. LL. Athelstan.

(*h*) Mir. c. 4, s. 16; 1 Hal. P.C. 27.

(*i*) Dalt. Just. c. 147.

(*k*) Vide R. *v.* Owen, 4 C. & P. 236.

(*l*) Vide sup. vol. II. p. 308.

[revenge, he was found guilty, condemned, and hanged accordingly (*m*). Thus also, in still later times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment (*n*). But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction.] After an infant has attained fourteen, he is presumably *doli capax*, and has no privilege by reason of his nonage, except in cases of omission and the like, as already noticed (*o*)—and at twenty-one, when infancy ceases, no privilege whatever in respect of age is recognized by law.

Another case in which the defect of understanding excuses from guilt, is that of [an *idiot* or a *lunatic* (*p*); for the rule of law as to the latter, (which may be easily adapted also to the former,) is, that "*furiosus furore solum punitur.*" In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself (*q*). Also] by the common law [if a man in his sound memory commits a capital offence, and, before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall

(*m*) Emlyn on 1 Hal. P. C. 25.

(*n*) Foster, 72.

(*o*) Vide sup. p. 96.

(*p*) As to the state of the law relative to idiots and lunatics in general, vide sup. vol. II. pp. 61, 519; vol. III. bk. IV. pt. III. c. IV.

(*q*) 3 Inst. 6.

[not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution (*r*).] And special provisions, of the same tendency, are now made by statute; for by 39 & 40 Geo. III. c. 94 (*s*), it is enacted, that if a person, charged with any offence, be brought up to be discharged for want of prosecution, and appear to be insane, the court may order a jury to be impanelled to try the sanity; and if they find him insane, may order him to be kept in custody till the pleasure of the Crown be known;—that if a person, indicted for any offence, appear insane, the court may (on his arraignment) order a jury to be impanelled to try the sanity; and if they find him insane, may order the finding to be recorded, and the insane person to be kept in like manner;—and that if, upon the trial for treason, murder or felony, insanity at the time of committing the offence is given in evidence, and the jury acquit, they must be required to find specially whether insane at the time of the commission of the offence, and whether he was acquitted on that account; and if they find in the affirmative, the court may order him to be kept in like manner till the Crown's pleasure be known.

[In the bloody reign, indeed, of Henry the eighth, a statute was made (*t*), which enacted that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M. c. 10. For, as is observed by Sir Edw. Coke (*u*), "the execution of an offender is, for example, *ut*

(*r*) 1 Hale, P. C. 34.

(*s*) This act applies to misdemeanor as well as felony. (R. *v.* Goode, 7 Ad. & El. 586; R. *v.* Little, Russ. & R. C. C. R. 430.) See also 14 & 15 Vict. c. 81, as to the removal to England and confinement there, of persons tried in India, and acquitted on the ground of insanity.

(*t*) 33 Hen. 8, c. 20

(*u*) 3 Inst. 6.

[*pœna ad paucos, metus ad omnes perveniat* :" but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be of no example to others.]

On the other hand, however, it is not every kind or degree of insanity, that will exempt a man from responsibility for his acts; and it may be laid down in general, that a partial unsoundness of mind will be no excuse. "It "is very difficult, indeed," as Lord Hale observes, "to "define the invisible line that divides perfect and partial "insanity, but it must be duly weighed and considered "both by the judge and jury, lest on the one side there be "a kind of inhumanity towards the defects of human nature, "or on the other side too great an indulgence given to "great crimes" (*y*). The line of distinction referred to by Hale, has never yet been fully traced. The judges, on a late occasion, however, gave it as their opinion (*z*), that if

(*y*) Some of the principal cases of partial insanity, upon charges of murder or malicious shooting or wounding, are enumerated in 1 Russ. on Crimes, p. 9 (ed. by Greaves). They are Arnold's case, 16 St. Tr. by Howell, 764; Lord Ferrers' case, 19 ibid. 947; Hadfield's case, Collinson on Lun. 480; Parker's case, ib. 477; Bowler's case, ib. 673; Bellingham's case, ib. Addend. 636; (vide R. *v.* Oxford, 9 C. & P. 533;) Offord's case, 5 C. & P. 168; Oxford's case, ubi sup. To these may be added R. *v.* Higginson, 1 C. & K. 129; and Macnaughten's case, 10 Cl. & Fin. 200.

(*z*) This opinion was given in answer to certain questions propounded to the judges by the House of Lords, in reference to the discussions in that house occasioned by Macnaughten's case, in 1843. (Vide 10 Cl. & Fin. above cited.) On the same occasion the judges said, that the question that has been generally left to the jury in cases of this description is whether the accused at the time of doing the act *knew the difference between right and wrong*; but that the more correct question is, whether he *had a sufficient degree of reason to know that he was doing an act that was wrong*. Unless, the law, however, is to be considered as conclusively settled by this authority, it would seem to be a still more correct question *whether he committed the act under the influence of any insane delusion, disguising from him its murderous character*; for, if he *did*, then, (whether the delusion was upon matter of opinion or matter of fact,) it is difficult to assent to the doctrine that a consciousness only that he was acting *wrong*, or *contrary to law*, would warrant convicting him for murder. At all events, it seems scarcely consistent with humanity, under such circumstances, to carry

a man who takes another's life appears to have known at the time that he was acting contrary to law, his being under an insane delusion that he was thereby redressing some supposed grievance or producing some public benefit, will not exempt him from the guilt of murder; neither will he be exempted by being under an insane delusion as to *facts;* provided the supposed facts, if real, would not have justified the act; but that, on the other hand, he will be exempted by such delusion as last mentioned, where the facts, if real, would have justified the act.

Again: [as to artificial, voluntarily contracted madness, by *drunkenness* or intoxication, which, depriving men of their reason, puts them in a temporary phrensy,—our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour (*a*). "A "drunkard," says Sir Edward Coke (*b*), "who is *voluntarius* "*dæmon,* hath no privilege thereby: but what hurt or ill "soever he doth, his drunkenness doth aggravate it: *nam* "*omne crimen ebrietas, et incendit, et detegit.*" It hath been observed that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence which may be necessary to make the blood move in Norway, would make an Italian mad. "A "German, therefore," says the President Montesquieu (*c*), "drinks through custom, founded upon constitutional ne-"cessity; a Spaniard drinks through choice, or out of the "mere wantonness of luxury; and drunkenness," he adds, "ought to be more severely punished, where it makes men

the capital sentence into effect. (See Lord Erskine's celebrated speech for Hadfield, where he puts the case of a lunatic destroying a man under the belief that he is a potter's vessel, and with the design of inflicting a malicious injury on the property of a third person, whom he believes to be the owner of the vessel; and where Lord Erskine argues that it would be impossible, in such a case, to convict for murder.)

(*a*) See Beverley's case, 4 Rep. 125; Reniger *v.* Fogossa, Plow. 19; R. *v.* Carroll, 7 C. & P. 145.

(*b*) 1 Inst. 247.

(*c*) Sp. L. b. 14, c. 10.

[" mischievous and mad, as in Spain and Italy, than where " it only renders them stupid and heavy, as in Germany " and more northern countries." And accordingly, in the warm climate of Greece, a law of Pittacus enacted, " that " he who committed a crime, when drunk, should receive " a double punishment: one for the crime itself, and the " other for the ebriety which prompted him to commit " it" (*d*). The Roman law, indeed, made great allowances for this vice: "*per vinum delapsis capitalis pœna remittitur*" (*e*). But, the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another.

II. Another deficiency of will is, where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed: which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter: at present only observing, that if any accidental mischief happens to follow from the performance of any *lawful* act] with due caution (*f*), [the party stands excused from all guilt:] but if a man, by doing any thing *unlawful*, (at least if it be *malum in se*, and not merely *malum prohibitum*,) or by doing anything lawful but without due caution,—produce a consequence which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse, but he is criminally guilty of whatever consequence may follow.

[*Ignorance* or *mistake* is another defect of will; when a man intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an igno-

(*d*) Puff. L. b. 8, c. 3.

(*e*) Ff. 49, 16, 6.

(*f*) 1 East, P. C. c. 5, s. 36.

[rance or mistake in fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his family, this is no criminal action (*g*): but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is wilful murder. For a mistake in point of law which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. "*Ignorantia juris, quod quisque tenetur scire, neminem excusat*" (*h*), is as well the maxim of our own law (*i*) as it was of the Roman (*k*).]

III. A third kind of defect of will is, that arising from *compulsion* and inevitable *necessity*. [These are a constraint upon the will whereby a man is urged to do that which his judgment disapproves; and, which it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God hath given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

Of this nature, in the first place, is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest; as when a legislator establishes iniquity by law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiæ*, or whether the inferior in this case is not bound to obey the Divine rather than the human law, it is not our business to decide; though the question, perhaps, among the casuists, will

(*g*) Cro. Car. 538; 1 Hale, P. C. 42.

(*h*) Vide R. *v.* Bailey, R. & R. C. C. 1.

(*i*) Plowd. 343; 1 Hale, P. C. 42. It has been held, that it is no defence for a foreigner charged with a crime committed in England, that he did not know he was doing wrong,—the act not being criminal in his own country. (R. *v.* Esop, 7 C. & P. 456.)

(*k*) Ff. 22, 6, 9.

[hardly bear a doubt. But however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff who burnt Latimer and Ridley in the bigoted days of Queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution.

As to persons in private relations. The principal case where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband; for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master (*l*); though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offences. And, therefore, if a woman commit theft, burglary or other civil offences against the laws of society by the coercion of her husband; or even in his company, which the law construes a coercion; she is not guilty of any crime, being considered as acting by compulsion and not of her own will (*m*): which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of King Ina, the West Saxon (*n*). And it appears that among the northern nations on the Continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman: the male or freeman only was punished, the female or slave dismissed: "*proculdubio quod alterum libertas, alterum necessitas impelleret* (*o*)." But (besides that in our law, which is a stranger to slavery, no impunity is given to

(*l*) Hawk. P. C. b. 1, c. 1, s. 14; 1 Hale, P. C. 44, 516.

(*m*) As to this privilege of the wife, vide sup. vol. II. p. 280.

(*n*) Cap. 57; Wilk. 29.

(*o*) Stiern. de Jure Sueon. l. 2, c. 4.

[servants, who are as much free agents as their masters,) even with regard to wives this rule admits of an exception in the case of murder, and the like, these offences being of a deeper dye (*p*). In treason also, (the highest crime which a member of society can, as such, be guilty of,) no plea of coverture shall excuse the wife—no presumption of her husband's coercion shall extenuate her guilt (*q*),—as well because of the odiousness and dangerous consequence of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself, as a subject, has forgotten to pay. In misdemeanors, also, we may remark another exception; that a wife may be indicted *with* her husband for keeping a brothel; for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex (*r*). And in all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence as much as any *feme sole.*]

Another species of compulsion or necessity is what our law calls *duress per minas* (*s*); or threats and menaces, which induce a fear of present death, or other grievous bodily harm; and [which take away the guilt of many crimes and misdemeanors—at least before the human tribunal (*t*);] and, [therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace (*u*).] Duress *per minas* is not however

(*p*) 1 Hale, P. C. 45, 47, 48, 516; Hawk. P. C. b. 1, c. 1, s. 11; Keyl. 31. Whether the exception includes *robbery* has been doubted. R. *v.* Cruse, 8 C. & P. 552.

(*q*) 1 Hale, P. C. 47.

(*r*) Hawk. P. C. b. 1, c. 1, s. 12.

(*s*) Vide sup. vol. I. p. 141.

(*t*) Fost. 14, 216; R. *v.* Tyler, 8 C. & P. 616.

(*u*) R. *v.* Tyler, ubi sup.; 1 Hale, P. C. 50.

an excuse for every species of crime: for, [though a man be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by the murder of an innocent (*x*). But in such a case he is permitted to kill the assailant; for there the law of nature and self-defence, its primary canon, have made him his own protector.] It is to be observed too, that the compulsion which takes away guilt, must be the fear of no less than present death or grievous bodily harm (*y*); for the mere apprehension of having houses burnt or goods spoiled is not sufficient (*z*). It must also be a just and well-grounded fear—"*qui cadere possit in virum constantem, non timidum et meticulosum,*" as Bracton expresses it (*a*) in the words of the civil law (*b*).

[There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which, without such obligation, would be criminal. And that is, when a man has his choice of two evils set before him, and being under a necessity of choosing one, he chooses the least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active; or if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity where a man, by the commandment of the law, is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority. It is here justifiable and even necessary to beat, or wound, or perhaps to kill, the offenders, rather than permit the murderer to escape, or the riot to continue. For the preserva-

(*x*) 1 Hale, P. C. 51.

(*y*) Bract. l. 3, tr. 1, c. 4; Co. Litt. 162 a, 253 b; 2 Inst. 483; Fost. ubi sup.; R. *v.* Southerton, 6 East, 149.

(*z*) Bract. ubi sup.

(*a*) Ibid.

(*b*) Ff. 4, 2, 5, 6.

[tion of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public; and therefore excuse the felony which the killing would otherwise amount to (*c*).

There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz. whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities? And this both Grotius (*d*) and Puffendorf (*e*), together with many other of the foreign jurists, hold in the affirmative; maintaining, by many ingenious, humane, and plausible reasons, that in such cases the community of goods, by a kind of tacit concession of society, is revived. And some even of our own lawyers have held the same (*f*), though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present (*g*). And this its doctrine is agreeable, not only to the sentiments of many of the wisest of the antients, particularly Cicero (*h*), who holds that "*suum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum*," but also to the Jewish law, as certified by King Solomon himself (*i*)—"If a thief steal "to satisfy his soul when he is hungry, he shall restore "sevenfold, and shall give all the substance of his house;" which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason: for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no one can possibly be an adequate judge, but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting

(*c*) 1 Hale, P. C. 51. See also the case of two persons clinging to a plank in shipwreck, post, p. 124.

(*d*) De Jure B. et P. l. 2, c. 2.

(*e*) L. of Nat. and N. l. 2, c. 6.

(*f*) Britt. c. 10; Mirr. c. 4, s. 16.

(*g*) 1 Hale, P. C. 54.

(*h*) De Off. l. 3, c. 5.

(*i*) Prov. vi. 30.

[so dubious an excuse: for by our laws such sufficient provision is made for the poor, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by Baron Puffendorf, and whereon he builds his principal arguments; which, however they may hold] elsewhere, [yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the necessitous; especially when we consider that the sovereign, on the representation of the ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship: an advantage which is wanted in many states, particularly those which are democratical; and these have in its stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate its rigour. But the founders of our constitution thought it better to vest in the Crown the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

To these several cases in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the person: which extend as well to the will as to the other qualities of the mind. It is the case of the *sovereign*, who by virtue of the royal prerogative is not under the coercive power of the law (*k*); which will not suppose him capable of committing a folly, much less a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries of what would be the consequence if the sovereign were to act thus and thus: since the law deems so

(*k*) 1 Hale, P. C. 44.

[highly of his wisdom and virtue as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and, therefore, has made no provision to remedy such a grievance. But of this sufficient was said in a former volume (*l*), to which we must refer the reader.]

(*l*) Vide sup. vol. II. p. 489.

CHAPTER III.

OF PRINCIPALS AND ACCESSORIES.



[It having been shown in the preceding chapter what persons are, or are not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending; viz. as *principal* and *accessory*.

I. A man may be *principal* in an offence, in two degrees. A principal in the first degree is he that is the actor or absolute perpetrator of the crime: and, in the second degree, he who is present, aiding and abetting the fact to be done (*a*). Which *presence* need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance (*b*). And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or persuading another to drink it (*c*), who is ignorant of its poisonous quality (*d*), or giving it to him for that purpose; and yet not administer it himself, nor be

(*a*) 1 Hale, P. C. 615; R. *v.* Howell, 9 Car. & P. 437. In the case of *rape*, if the prisoner was present aiding and abetting, he may in the indictment be charged as principal either in the first or the second degree. (R. *v.* Crisham, 1 Car. & M. 187.) A principal in the second degree in larceny, cannot be convicted as a receiver. (Queen *v.* Perkins, 21 L. J. (M. C.) 152.)

(*b*) Foster, 350.

(*c*) Kel. 52.

(*d*) Foster, 349.

[present when the very deed of poisoning is committed (*e*). And the same reasoning will hold, with regard to other murders committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast, with an intent to do mischief; or exciting a madman to commit murder, so that death thereupon ensues: in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily pre-supposing a principal; and the poison, the pitfall, the beast, or the madman, cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty, either as principal or accessory, and cannot be so as accessory, it follows that he must be so as principal; and, if principal, then in the first degree: for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist (*f*).] It is to be observed, however, that though the law makes the distinction between principals in the first and in the second degree, yet in general the punishment inflicted upon either class of offenders is the same. But where a statute imposes the punishment of death on the persons committing a specified offence, and not on the offence itself in terms,—it has been held that such capital punishment will apply to principals in the first degree only, and not to those in the second (*g*).

II. [An *accessory* is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed.

(*e*) 3 Inst. 138; 1 Hale, P. C. 616; Hawk. P. C. b. 2, c. 29, s. 11.

(*f*) 1 Hale, P. C. 617; Hawk. P. C. b. 2, c. 29, s. 11.

(*g*) Foster, 356, 357.

[In considering the nature of which degree of guilt, we will first examine what offences admit of accessories, and what not; secondly, who may be an accessory *before* the fact; thirdly, who may be an accessory *after* it; and lastly, how accessories, considered merely as such, and distinct from principals, are to be treated.

1. And, first, as to what offences admit of accessories, and what not. In treason there are no accessories, but all are principals: the same acts that make a man accessory in felony, making him a principal in treason, upon account of the heinousness of the crime (*i*). Besides, it is to be considered, that the bare intent to commit treason is many times actual treason; as imagining the death of the sovereign, or conspiring to take away his crown. And, as no one can advise or abet such a crime without an intention to have it done, there can be no accessories before the fact; since the very advice and abetment amount to principal treason.] The mere advice, however, to commit the act will not, in some other species of treason, such as forging the Great Seal, amount (though it be of a highly criminal nature) to treason at all, unless the thing advised be actually performed; for it is the act in these cases, and not merely the design, which constitutes the treason (*k*). In murder and other felonies [there may be accessories; except only in those offences which by judgment of law are sudden and unpremeditated, as manslaughter and the like; which therefore cannot have any accessories *before* the fact (*l*). So, too, in all crimes under the degree of felony, there are no accessories either *before* or *after* the fact; but all persons concerned therein, if guilty at all, are

(*i*) 3 Inst. 138; 1 Hale, P. C. 613. As to the crime of treason, vide post, c. VI.

(*k*) Foster, 342.

(*l*) 1 Hale, P. C. 615. Hale also says (p. 616) that there can be no accessories in manslaughter *per infortunium*, because, though a felony, there is, in such cases, no judgment of death. (And see Evans' case, Foster, 73.)

[principals (*m*); the same rule holding with regard to the highest and lowest offences, though upon different reasons. In treason all are principals, *propter odium delicti;* in trespass all are principals, because the law, which *de minimis non curat*, does not descend to distinguish the different shades of guilt] in crimes below the degree of felony.

2. [As to the second point, who may be an accessory *before* the fact: Sir Matthew Hale (*n*) defines him to be one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory; for if such procurer, or the like, be present, he is guilty of the crime as principal (*o*). If A. then advises B. to kill another, and B. does it in the absence of A.; now B. is principal and A. is accessory to the murder. And this holds, even though the party killed be not *in rerum naturâ* at the time of the advice given. As, if A., the reputed father, advises B., the mother of a bastard child, unborn, to strangle it when born, and she does so; A. is accessory to this murder (*p*). And it is also settled (*q*), that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in anywise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act,] supposing at least that it was a probable consequence thereof (*r*); [but is not accessory to any act distinct from the other.] As if A. advises B. to rob C., and B. does so accordingly, and on resistance made, kills C., B. is guilty

(*m*) 1 Hale, P. C. 613, 616; Moland's case, 2 Moody's C. C. R. 276; Queen *v.* Greenwood, 21 L. J. (M. C.) 127.

(*n*) 1 Hale, P. C. 615, 616.

(*o*) He is principal, if present only at the commencement of the transaction, though absent before its completion. (R. *v.* Jordan, 7 Car. & P. 432; R. *v.* Tuckwell, 1 Car. & Mar. 215.)

(*p*) Dyer, 186.

(*q*) Foster, 125.

(*r*) This qualification of the rule will be found in Fost. 370. (And see 1 Hale, P. C. 617.) And it seems that in reason it must be so qualified.

of murder as principal, and A. as accessory (*s*). [But if A. commands B. to burn C.'s house, and he, in so doing, commits a robbery; now A., though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature (*t*). But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies; the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance (*u*).

3. An accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts or assists the felon (*x*). Therefore, to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed (*y*),] and that it was committed by the party in question. [In the next place he must receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his pursuers, a house or other shelter to conceal him, or open force and violence to rescue or protect him (*z*). So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with clothes or other necessaries is no offence; for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law (*a*). To buy

(*s*) Fost. 370. Blackstone, vol. iv. p. 37 (after Hale), puts the case of A. commanding B. to beat C., and B. beating him so that he dies. But this alone would perhaps not suffice to make A. accessory to the murder.

(*t*) Hawk. P. C. b. 2, c. 29, s. 22.

(*u*) Ibid. s. 20.

(*x*) 1 Hale, P. C. 618.

(*y*) Hawk. P. C. b. 2, c. 29, s. 32.

(*z*) Ibid. ss. 26, 27, 28.

(*a*) 1 Hale, P. C. 620, 621.

[or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was, therefore, at common law, a mere misdemeanor, and made not the receiver accessory to the theft, because he received the *goods* only and not the *felon* (*b*). But now, by the statute] 7 & 8 Geo. IV. c. 29, s. 54, such receivers may be indicted either as accessories after the fact or for a substantive felony (*c*); and they are punishable with penal servitude or imprisonment, and (if a male) with whipping, at the discretion of the court (*d*).

[The felony must be complete at the time of the assistance given, else it makes not the assistor an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide; for till death ensues there is no felony committed (*e*). But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child the parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband receives his wife, who have any of them committed a felony, the receivers become accessories *ex post facto* (*f*). But a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed

(*b*) 1 Hale, P. C. 620, 621.

(*c*) Counts for stealing, and also for receiving, may now be inserted in the same indictment. (11 & 12 Vict. c. 46, s. 3.) See also as to indictments against receivers, 14 & 15 Vict. c. 100, ss. 14, 15.

(*d*) 7 Geo. 4, c. 29, s. 54; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3, (et vide post, c. v.) So in Blackstone's time, all such receivers might be indicted as accessories after the fact, and transported for fourteen years. He remarks that in France such receivers were punished with death; and that according to the Gothic constitution there were three sorts of thieves, "*unum qui consilium* "*daret, alterum qui contrectaret, tertium qui receptaret et occuleret; pari* "*pœnæ singulos obnoxios.*" And he cites Stiern. de Jure Goth. l. 3, c. 5

(*e*) Hawk. P. C. b. 2, c. 29, s. 35.

(*f*) 3 Inst. 108; Hawk. P. C. b. 2, c. 29, s. 34.

[to act under his coercion; and therefore she is not bound, neither ought she, to discover her lord (*g*).

4. The last point of inquiry is, how accessories are to be treated, considered distinct from principals: and the general rule of the antient law, (borrowed from the Gothic constitutions (*h*),) is this: that accessories shall suffer the same punishment as their principals; if one be liable to death, the other is also liable: as, by the laws of Athens, delinquents and their abettors were to receive the same punishment (*i*).] With which, as regards accessories *before* the fact, the modern rule is strictly consonant; for by 11 & 12 Vict. c. 46, these are to be dealt with in all respects as if they were principals. [Why then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment?

For these reasons: 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2.] Because, though accessories before the fact are treated as principals, yet accessories after the fact are punishable with less severity (*k*). 3. Because, formerly, no man could be tried as accessory till

(*g*) 1 Hale, P. C. 47, 621; see Reg. *v.* Good, 1 Car. & K. 185. So also she cannot be indicted for receiving goods stolen by him. (Reg. *v.* Brooks, 22 L. J. (M. C.) 121.)

(*h*) See Stiern. de Jure Goth. l. 3, c. 5.

(*i*) Pott. Antiq. b. 1, c. 26.

(*k*) Accessories after the fact are in general punishable by the several statutes which create the offences, with imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, at the discretion of the court. As to accessories after the fact to murder, see 9 Geo. 4, c. 31, s. 3. It is the opinion of Blackstone that, "if a distinction were constantly to be made between the punishments of principals and accessories even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices by reason of the difference of his punishment;" and he cites Beccaria, c. 37.

after the principal was convicted, or, at least, he must have been tried at the same time with him (*l*); though, by the statute of 11 & 12 Vict. c. 46, just mentioned, that rule, after some previous relaxation, is now wholly abolished (*m*). 4. [Because, though a man be indicted as accessory, and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counselling a felon, is no acquittal of the felony itself:] yet it was formerly a [matter of some doubt, whether, if a man were acquitted as principal, he could afterwards be indicted as accessory before the fact, since those offences are frequently very near allied; and, therefore an acquittal of the guilt of one may be an acquittal of the other also (*n*).] But that doubt has been since overruled (*o*); and it has always been [clearly held, that one acquitted as principal may be indicted as accessory *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other.] These considerations serve fully to account for the distinction made by our law between principal and accessory; though the punishment is in all cases the same, with regard to principals and accessories before the fact.

(*l*) 1 Hale, P. C. 623; Fost. 363.

(*m*) It had been abolished as to accessories before the fact by 7 Geo. 4, c. 64. By 11 & 12 Vict. c. 46, it is provided, that any accessory before the fact shall be indicted, tried, convicted, and punished, in all respects as if he were a principal felon; and further, that any accessory after the fact to any felony, may be indicted and convicted either as an accessory after the fact together with the principal felon, or after the conviction of the principal felon, or of a substantive felony, whether the principal felon shall have been convicted or not or shall be amenable to justice or not, and may thereupon be punished as an accessory after the fact if convicted, as an accessory may be punished; and, however indicted, his offence may be tried and punished by any court which has jurisdiction to try the principal felon. But no person once duly tried for such offence, whether as accessory or for a substantive felony, shall be liable to be again indicted or tried for the same offence. Et vide 14 & 15 Vict. c. 100, s. 15.

(*n*) 1 Hale, P. C. 625, 626; Hawk. P. C b. 2, c. 35, s. 11.

(*o*) R. *v.* Birchenough, 1 M. C. C.R. 477; R. *v.* Parry, 7 C. & P. 836.

CHAPTER IV.

OF OFFENCES AGAINST THE PERSON.



In the present chapter we are to enter, in pursuance of the distribution before laid down (*a*), upon the detail of the several species of crimes and misdemeanors, with the punishments annexed to each by the laws of England.

And here we shall pursue in general, and so far as the nature of the criminal law permits, the same arrangement which we adopted for the illustration of the law relative to civil injuries (*b*); and shall, consequently, be led to treat—first, of offences against the *persons* of individuals; secondly, against their *property;* and thirdly, against those *public rights*, which belong in common to all the different members of the commonwealth.

First, then, with respect to those crimes, which affect the persons of individuals.

Were such offences as these, and such as are committed against the property of individuals, confined to individuals only, [and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs; for which a satisfaction would be due only to the party injured: the manner of obtaining which was the subject of our inquiries in the preceding volume. But the wrongs which we are now to treat of are of a much more extensive consequence; in the first place, because it is impossible they can be committed without a violation of the laws of nature—of the moral as well as political rules of right: secondly, because they include in them almost

(*a*) Vide sup. p. 74. (*b*) Vide sup. vol. III. bk. V. c. VII.

[always a breach of the public peace; and, lastly, because by their example and evil tendency, they threaten and endanger the subversion of all civil society. Upon these accounts it is, that, besides the private satisfaction due and given in many cases to the individual by action for the private wrong, the Government also calls upon the offender to submit to public punishment for the public crime; and the prosecution of these offences is always at the suit and in the name of the sovereign; in whom, by the tenure of our constitution, the *jus gladii*, or executory power of the law, entirely resides. Thus, too, in the old Gothic constitution, there was a threefold punishment inflicted on all delinquents: first, for the private wrong to the party injured: secondly, for the offence against the sovereign by disobedience to the laws; and thirdly, for the crime against the public by their evil example. Of which we may trace the groundwork in what Tacitus tells us of his Germans (*c*); that, whenever offenders were fined, "*pars mulctæ regi, vel civitati, pars ipsi, qui vindicatur, vel propinquis ejus, exsolvitur.*"]

[Of crimes injurious to the *persons* of private subjects, the most principal and important is the offence of taking away life, which is the immediate gift of the great Creator; and of which, therefore, no man can be entitled to deprive himself or another, but in some manner either expressly commanded in, or evidently deducible from, those laws which the Creator has given us—the Divine laws of either nature or revelation.] The first offence, therefore, to be discussed in the present chapter will be that of—

I. [*Homicide*, (or destroying the life of man,) in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.]

Now homicide, or the killing of any human creature, is either *free from legal guilt*, (the circumstances being such

(*c*) De Mor. Germ. c. 12.

as to render it *justifiable*, or at least *excusable*); or it is *felonious* (*d*).

1. Justifiable homicide is of divers kinds. First, such as is occasioned by the due *execution of public justice*, in putting a malefactor to death who hath forfeited his life by the laws of his country. [This is an act of necessity, and even of civil duty; and, therefore, not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable: therefore, wantonly to kill the greatest of malefactors, (such as a felon or a traitor, attainted or outlawed,) deliberately, uncompelled and extrajudicially, is murder (*e*). For, as Bracton very justly observes, "*istud homicidium, si fit ex livore, vel delec-" tatione effundendi humanum sanguinem, licet justè occidatur " iste, tamen occisor peccat mortaliter, propter intentionem " corruptam*" (*f*). And, further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder (*g*). And, upon this account, Sir Matthew Hale himself, though he accepted the place of a judge of the Common Pleas under Cromwell's government, (since it is necessary to decide the disputes of civil property in the worst of times,) yet declined to sit on the Crown side at the assizes or to try prisoners, having very strong objections to the legality of the usurper's commission (*h*); a distinction, perhaps, rather too refined, since the punishment of crimes is at least as necessary to society as maintaining the boundaries of property. Also such judgments, when legal, must be executed by the proper officer or his appointed deputy: for no one else is *required* by law to do it, which requisition

(*d*) Blackstone describes it (vol. iv. p. 177) as of three kinds: *justifiable*, *excusable*, and *felonious*; and this accords with the division of Hawkins; but since the passing of the statute 9 Geo. 4, c. 31 (vide post, p. 131), to be afterwards mentioned, this division appears to require some modification, as in the text.

(*e*) 1 Hale, P. C. 497.

(*f*) L. 3, tr. 2, c. 4.

(*g*) Hawk. P. C. b. 1, c. 28, s. 5; 1 Hale, P. C. 497.

(*h*) Burnet *in vitam*.

[it is that justifies the homicide. If another person doth it of his own head, it is held to be murder (*i*), even though it be the judge himself (*k*). It must, further, be executed *servato juris ordine*—it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versâ*, it is murder; for he is merely ministerial, and, therefore, only justified when he acts under the authority and compulsion of the law; but if he changes one kind of death for another, he then acts by his own authority; which extends not to the commission of homicide,] otherwise than as according to the sentence; [and, besides, such licence might occasion a very gross abuse of his power. The sovereign, indeed, may remit part of a sentence,—as, in the case of treason, all but the beheading; but this is no change, no introduction of a new punishment; and in the case of felony, where the judgment is to be *hanged*, the sovereign, it hath been said, cannot legally order even a peer to be beheaded.]

Secondly, justifiable homicide may be [committed for the *advancement of public justice*;] as in the following instances: 1. Where an officer or his assistant, in the due execution of his office, either in a criminal or civil case, arrests or attempts to arrest a party who resists, and is consequently killed in the struggle (*l*); 2. Where, in case of a riot or rebellious assembly, the officers or their assistants kill any of the mob, in the endeavour to disperse them; which is justifiable [both at common law and by the Riot Act, 1 Geo. I. c. 5 (*m*);] 3. [Where the prisoners in a gaol assault the gaoler or officer, and he in his defence kills any of them; which is justifiable, for the sake of preventing an escape (*n*);]*4. Where an officer or his assistant, in the due

(*i*) 1 Hale, P. C. 501; Hawk. P. C. b. 1, c. 28, s. 9.

(*k*) Dalt. Just. c. 150.

(*l*) Foster, 270, 309; 1 Hale, P. C. 494. This is similar (as Blackstone remarks, vol. iv. p. 180) to the old Gothic constitutions, which, Stiernhook informs us, (De Jure Goth. l. iii. c. 5), "*Furem, si aliter capi non* "*possit, occidere permittunt.*"

(*m*) 1 Hale, P. C. 495; Hawk. P. C. b. 1, c. 65, ss. 11, 12.

(*n*) 1 Hale, P. C. 496.

execution of his office, arrests or attempts to arrest a party for felony (*o*), or for a dangerous wound given; and the party having notice thereof flies, and is killed by such officer or assistant in the pursuit (*p*); 5. Where, upon such offence as last described, a private person in whose sight it has been committed, arrests or endeavours to arrest the offender; and kills him in resistance or flight, under the same circumstances as above mentioned with regard to an officer (*q*). But, in all these cases, [there must be an apparent necessity—that is, it must be shown that] the party could not be otherwise secured, [the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide was committed: otherwise, without such absolute necessity, it is not justifiable.]

Thirdly, [such homicide as is committed for the *prevention of any forcible and atrocious crime* (*r*), is justifiable by the law of nature (*s*); and also by the law of England as it stood so early as at the time of Bracton (*t*),] and as it stands at the present day (*u*). [If any person attempts the robbery or murder of another, or attempts to break open a house *in the night time*, and shall be killed in such attempt,] either by the party assaulted, or the owner of the house, or the servant attendant upon either, or by any other person present and interposing to prevent mischief (*v*), [the slayer shall be acquitted and discharged (*x*). This reaches not

(*o*) But the officer is not protected if he kill a man *apparently* committing a misdemeanor, though the crime be really a felony. (See Queen *v.* Dodson, 20 L. J. (M. C.) 57.)

(*p*) Fost. 271.

(*q*) Fost. 271; 2 Hale, P. C. 77, 82. As to the killing by a private person who arrests on suspicion only, and is resisted, see 2 Hale, P. C. 83, 84; Fost. 318. It seems it is not justifiable.

(*r*) Fost. 275; Hawk. P. C. b. 1, c. 28, ss. 21, 24.

(*s*) Puff. L. of N. l. ii. c. 5.

(*t*) L. 3, tr. 2, c. 36.

(*u*) Vide Mawgridge's case, Keyl. 128, 129.

(*v*) Fost. 274.

(*x*) 1 Hale, P. C. 488; Fost. 274. This was expressly provided by the statute 24 Hen. 8, c. 5; and though that statute has been since repealed by 9 Geo. 4, c. 31, its repeal has made no alteration of the law as laid down in the text,—the statute of Henry the eighth having been made in affirmance of the common law. (See Fost. 275.)

[to any crime unaccompanied with force,—as picking of pockets; or to the breaking open of any house *in the day time*, unless it carries with it an attempt of robbery,] arson, murder, or the like (*y*). [So the Jewish law, which punished no theft with death, makes homicide only justifiable in case of *nocturnal* housebreaking; "if a thief be found breaking "up, and he be smitten that he die, no blood shall be shed "for him; but if the sun be risen upon him, there shall "blood be shed for him, for he should have made full "restitution" (*z*).

At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact (*a*): and by the Roman law of the Twelve Tables, a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapon (*b*): which amounts very nearly to the same as is permitted by our own constitutions. The Roman law also justifies homicide, when committed in defence of the chastity either of one's self or relations (*c*): and so also, according to Selden (*d*), stood the law in the Jewish republic. The English law likewise justifies a woman killing one who attempts to ravish her (*e*): and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other (*f*). And no doubt the forcibly attempting a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor (*g*.)]

(*y*) 1 Hale, P. C. 488; 1 East, P. C. c. 5, s. 44; Hawk. P. C. b. 1, c. 28, s. 23; Fost. 274; see also 24 Hen. 8, c. 5, now repealed by 9 Geo. 4, c. 31.

(*z*) Ex. xxii. 2.

(*a*) Potter, Antiq. b. i. c. 24.

(*b*) Cic. pro Milone, 3; Ff. 9, 2, 4.

(*c*) "*Divus Hadrianus rescripsit* "*eum qui stuprum sibi vel suis inferentem occidit, dimittendum.*"—Ff. 48, 8, 1.

(*d*) De Legibus Hebræor. l. iv. c. 3.

(*e*) Bac. Elem. 34; Hawk. P. C. b. 1, c. 28, s. 21; Fost. 274.

(*f*) 1 Hale, P. C. 485, 486.

(*g*) Blackstone here proceeds (vol. iv. p. 181) to give his opinion of the

Fourthly, there is one species of justifiable homicide [where the party slain is equally innocent, as he who occasions his death: and yet this homicide is also] justifiable (*h*), [from the great universal principle of self-preservation; which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish; as, among others, in that case mentioned by Lord Bacon (*i*), where two persons being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned.]

2. [Excusable homicide is of two sorts, either *per infortunium*, by misadventure; or *se defendendo*,] upon a sudden affray.

[First, homicide *per infortunium*, is where a man, doing a lawful act without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a stander by; or where a person is shooting at a mark, and undesignedly kills a man (*k*): for the act is lawful, and the effect is

principle upon which homicide becomes justifiable, when for the prevention of crime. He says, "The "one uniform principle that runs "through our own and all other laws "seems to be this, that where a "crime, in itself capital, is endea- "voured to be committed by force, "it is lawful to repel that force by "the death of the party attempting." And at the same time he combats the doctrine of Locke's Essay on Government, p. 2, c. 5, "That all man- "ner of force, without right, upon a "man's person, puts him in a state "of war with the aggressor; and, of "consequence, being in such a state "of war, he may lawfully kill him "that puts him under this unnatu- "ral restraint." We may be allowed, however, to question the soundness of the former as well as the latter opinion. If the former be correct, it will follow that, as rape has now ceased to be capital, the justification of homicide for the prevention of rape is also taken away; but there can be no doubt that it remains in full force.

(*h*) Blackstone says *excusable* (vol. iv. p. 186); but it seems clear that this is a case of justifiable and not merely excusable homicide; and it is so ranked by Hawkins, P. C. b. 1, c. 28, s. 26.

(*i*) Elem. c. 5. See also Hawk. P. C. b. 1, c. 28, s. 26.

(*k*) Hawk. P. C. b. 1, c. 29, ss. 2, 6.

[merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure, for the act of correction was lawful; but if he exceeds the bounds of moderation either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases, according to the circumstances, murder (*l*); for the act of immoderate correction, is unlawful. Thus by an edict of the Emperor Constantine (*m*), when the rigour of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment; and if death accidentally ensued, he was guilty of no crime; but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet grosser manner, "*immoderate suo jure utatur,—tunc reus homicidii sit.*"

But to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and sword playing, the succeeding amusements of their posterity: and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony or manslaughter. But if the sovereign command or permit such diversion, it is said to be only misadventure; for then the act is lawful (*n*). In like manner, as by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games authorized or permitted by the state, was not held to be guilty of homicide (*o*). Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of dangerous consequence (*p*).

(*l*) 1 Hale, P. C. 473, 474; Hawk. P. C. b. 1, c. 29, s. 5.

(*m*) Cod. l. ix. t. 14.

(*n*) Hawk. P. C. b. 1, c. 29, s. 8.

(*o*) Plato de Leg. l. vii.; Ff. 9, 2, 7.

(*p*) Hawk. P. C. b. 1, c. 29, s. 3; Ward's case, 1 East, P. C. 270.

[And in general, if death ensues in consequence of a dangerous, idle, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing,—in these and similar cases the slayer is guilty of manslaughter, and not misadventure only; for these are unlawful acts (*q*).

Secondly, homicide *se defendendo*, upon a sudden affray (*r*), is also excusable rather than justifiable by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of an atrocious crime,] and where the slayer is himself free from all blame (*s*); [which is not only a matter of excuse, but of justification. But the self-defence which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him:] in which latter case the law presumes both parties to be in some degree in fault (*t*). [And this is] one instance, of (*u*) [what the law expresses by the word *chance medley*; or, as some chose rather to write it, *chaud medley*: the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import: but the former is, in common speech, too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. VIII. c. 5, and our antient books, that it is properly applied to such killing as happens upon a sudden rencounter (*x*). This right of natural de-

(*q*) 1 Hale, P. C. 472; Fost. 275; Hawk. P. C. b. 1, c. 30, s. 1.

(*r*) This is called by Mr. Justice Foster, "homicide *se defendendo* upon chance medley."—Fost. 275.

(*s*) Hawk. P. C. b. 1, c. 28, s. 24.

(*t*) Ibid. The slayer is however no longer punishable by law, though it was formerly otherwise Vide post, p. 131.

(*u*) Blackstone has here fallen into the error of considering the term *chance medley*, as confined to the case of excusable homicide in self-defence on sudden affray. It is clear, however, that the term equally applies to manslaughter on a sudden quarrel. See stat. 24 Hen. 8, c. 5; Keyl. 67; 3 Inst. 55, 59; Hawk. P. C. b. 1, c. 30, s. 1; Fost. 275.

(*x*) Blackstone (vol. iv. p. 184) defines *chance medley*, to be such kill-

[fence does not imply a right of attacking; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases; when certain and immediate suffering, would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible, or at least probable, means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide in self-defence,] upon sudden affray, [from that of manslaughter in the proper legal sense of the word (*y*). But the true criterion between them seems to be this: when both parties are actually combating, at the time when the mortal stroke is given,] or if the slayer was not at that time in immediate danger of death (*z*), [the slayer is guilty of manslaughter: but if the slayer hath not begun to fight, or having begun,] declines, or [endeavours to decline, any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence (*a*). For which reason the law requires, that the person who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault,] before he gives the mortal stroke (*b*); and that, not fictitiously; or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood (*c*). And

ing as happens *in self-defence* upon a sudden rencounter.

(*y*) 3 Inst. 55.

(*z*) Fost. 277.

(*a*) Ibid.

(*b*) Blackstone says "before he turns upon his assailant." (4 Bl. Com. 185.) But though a person retreating to the wall should give several wounds in the course of his retreat, yet if he gives no mortal one till he gets thither, it is homicide *se defendendo* only. 1 Hale, P. C. 479; Hawk. P. C. b. 1, c. 29, s. 15.

(*c*) If a man strike another upon malice prepense, and then fly to the wall, and there kill him in his own defence, he is guilty of murder. Hawk. P. C. b. 1, c. 29, s. 17.

though it may be cowardice, in time of war between two [independent nations, to flee from an enemy, yet between two fellow-subjects the law countenances no such point of honour: because the sovereign and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves (*d*). In this the civil law also agrees with ours, or perhaps goes rather farther,—"*qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt*" (*e*). The party assaulted, must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him (*f*); for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm, and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice (*g*), as well as of the municipal law.

And, as the *manner* of the defence, so is also the *time* to be considered; for if the person assaulted, does not fall upon the aggressor till the fray is over, or when he is running away, this is revenge and not defence. Neither under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder; for if two persons, A. and B., agree to fight a duel, and A. gives the first onset, and B. retreats as far as he safely can, and then kills A.; this is murder, because of the previous malice and concerted design (*h*). But if A., upon a sudden quarrel, assaults B. first, and upon B.'s returning the assault, A. really and *bonâ fide* flies; and, being driven to the wall, turns again upon B. and kills him: this may be *se defendendo* according to some of our writers (*i*): though others (*k*) have thought this opinion too favourable, inasmuch as the necessity, to which he is at last reduced, originally arose

(*d*) 1 Hale, P. C. 481.
(*e*) Ff. 9, 2, 45.
(*f*) 1 Hale, P. C. 483.
(*g*) Puff. b. 2, c. 5, s. 13.
(*h*) 1 Hale, P. C. 479.
(*i*) Ibid. 482.
(*k*) Hawk. P. C. b. 1, c. 29, s. 17.

[from his own fault (*l*). Under this excuse of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting, being construed the same as the act of the party himself (*m*).]

Excusable homicide, in both the species here described, was formerly considered as involving in it some degree of legal blame or punishment; and as distinguishable, in this respect, from that which was *justifiable*. In the case of misadventure the law presumed negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it: who therefore was not altogether faultless (*n*) [And as to the necessity which excuses a man who kills another] in a sudden fray [*se defendendo*, Lord Bacon (*o*) entitles it *necessitas culpabilis*.] For it was always understood, (as before remarked,) that [the quarrel or assault arose from some unknown wrong, or some provocation in word or deed: and since in quarrels both parties may be, and usually are, in some fault: and it scarce can be tried who was originally in the wrong: the law would not hold the survivor entirely guiltless. The law besides might have a further view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining that he who slays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.]

Nor was [the law of England singular in this respect. Even the slaughter of enemies required a solemn purgation among the Jews; which implies that the death of a man, however it happens, will leave some stain behind it.

(*l*) If the first blow was with malice prepense, and not upon a sudden quarrel, the case is clearly murder. Vide sup. p. 127, n. (*c*).

(*m*) 1 Hale, P. C. 484.

(*n*) Hawk. P. C. b. 1, c. 28, s. 24.

(*o*) Elem. c. 5.

[And the Mosaical law (*p*) appointed certain cities of refuge, for him who killed his neighbour unawares: "as if a man "goeth into the wood with his neighbour to hew wood, and "his hand fetches a stroke with his axe to cut down a tree, "and the head slippeth from the helve, and lighteth upon "his neighbour that he die, he shall flee unto one of these "cities and live." But it seems he was not held wholly blameless, any more than in the English law: since the avenger of blood might slay him before he reached his asylum: or if he afterwards stirred out of it, till the death of the high priest. In the Imperial law, likewise (*q*), casual homicide was excused by the indulgence of the emperor, signed with his own sign manual, "*adnotatione principis*;" otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks (*r*), homicide by misfortune was expiated by voluntary banishment for a year (*s*). In Saxony, a fine was paid to the kindred of the slain: which also, among the Western Goths, was little inferior to that of voluntary homicide (*t*);] and formerly in France (*u*), no person was ever absolved in cases of this nature, [without a largess to the poor, and the charge of certain masses for the soul of the party killed.

The penalty inflicted by our laws, is said by Sir Edward Coke to have been antiently no less than death (*x*); which, however, is with reason denied by later and more accurate writers (*y*). It seems rather to have consisted in a forfeiture; some say of all the goods and chattels, others only of part of them; by way of fine or *weregild* (*z*): which was

(*p*) Numb. xxxv. and Deut. xix.

(*q*) Cod. 9, 16, 5.

(*r*) Plato de Leg. l. 9.

(*s*) To this expiation by banishment, the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty-third Iliad, that, when a child, he was obliged to flee his country for casually killing his playfellow,—"νηπιος οὐκ ἐθελων."

(*t*) Stiern. de Jure Goth. l. 3. c. 4.

(*u*) 4 Bl. Com. 188, cites De Morney on the Digest.

(*x*) 2 Inst. 148, 315.

(*y*) 1 Hale, P. C. 425; Hawk. P. C. b. 1, c. 29, s. 21; Fost. 282.

(*z*) Post. 287.

[probably disposed of, (as in France,) *in pios usus*, according to the humane superstition of the times, for the benefit of *his* soul who was suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty, especially if a total forfeiture, growing more severe than was intended, in proportion as personal property became more considerable, the delinquent had, as early as our records will reach (*a*), a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same (*b*).] And in later times, to prevent this expense, in cases where the death notoriously happened by misadventure or in self-defence, the judges usually directed a general verdict of acquittal (*c*). But by statute 9 Geo. IV. c. 31, s. 10, it is now provided, that no punishment or forfeiture, shall be henceforth incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony. So that all practical distinction between justifiable and excusable homicide is now at length wholly done away.

3. [*Felonious* homicide is an act of a very different nature from the former; being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

Self-murder, — the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure,— though the attempting it seems to be countenanced by the civil law (*d*), yet was punished, by the Athenian law, with cutting off the hand which did the desperate deed (*e*). And also the law of England wisely and religiously considers,

(*a*) Fost. 283.

(*b*) Hawk. P. C. b. 2, c. 37, s. 2.

(*c*) Fost. 288; 4 Bl. Com. 188; and see Christian's note at that place.

(*d*) "*Si quis impatientia doloris, aut tædio vitæ, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum.*"—Ff. 49, 16, 6.

(*e*) Pott. Antiq. b. 1, c. 26.

[that no man hath a power to destroy life, but by commission from God, the author of it: and as the suicide is guilty of a double offence: one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the sovereign, who hath an interest in the preservation of all his subjects: the law has, therefore, ranked this among the highest crimes,—making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty,] as the law is laid down by Blackstone, [of murder (*f*). A *felo de se*, therefore, is he that deliberately puts an end to his own existence;] and he also is so considered, who, maliciously attempting to kill another, occasions his own death; as where a man shoots at another, and the gun bursts and kills himself (*g*). But if a man is killed at his own request by the hand of another, the former is not deemed in law a *felo de se*, though the latter is a murderer (*h*). In homicide committed on one's self, [the party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our coroners' juries are apt to carry it, viz. that the very act of suicide is an evidence of insanity: as if every man, who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was

(*f*) 4 Bl. Com. p. 189; Keylw. 136. It has been since adjudged that such accessory is not liable to be tried for murder, as his principal cannot be tried. (R. *v.* Russell, 1 Moo. C. C. R. 356; R. *v.* Laddington, 9 C. & P. 79.) If two persons, however, mutually agree to commit suicide *together*, and accordingly take poison or the like together, and one only dies, the survivor is guilty of murder. R. *v.* Dyson, R. & R. 523; R. *v.* Alison, 8 C. & P. 418.

(*g*) Hawk. P. C. b. 1, c. 27, s. 4.

(*h*) Ibid. s. 6.

[observed in a former chapter (*i*), to form a legal excuse. And therefore if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man (*k*).

But now the question follows, what punishment can human laws inflict, on one who has withdrawn himself from their reach? They can only act upon what he has left behind him—his reputation and fortune;] and this the law of England formerly did with the greatest severity. It acted [on the former, by an ignominious burial in the highway, with a stake driven through his body,] and without Christian rites of sepulture; [on the latter, by a forfeiture of all his goods and chattels to the Crown, hoping that his care for either his own reputation or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act.] But the only consequences now are, the forfeiture and the deprivation of Christian rites. For by 4 Geo. IV. c. 52, s. 1, it is provided, that it shall not be lawful for the coroner to direct the interment of a

(*i*) Vide sup. p. 100.

(*k*) 1 Hale, P. C. 412. The views of our most eminent writers upon criminal law agree, in this respect, with Blackstone. "It is not every melancholy or hypochondriac distemper that denominates a man *non compos*," (says Sir M. Hale, vol. i. p. 412,) "for there are few who commit this offence (of suicide) but are under such infirmities; but it must be such an alienation of mind that renders them to be madmen or frantic, or destitute of reason." And Hawkins, (b. 1, c. 27, s. 2,) lays down a similar doctrine; and reprobates the notion, which he says had unaccountably prevailed of late, that every one who kills himself must be *non compos*. It is to be observed, however, that there are many cases of suicide, in which no motive for the act appears, or can be imagined, such as can be supposed to operate upon a mind free from morbid delusion. In these circumstances the practice of juries to return a verdict of insanity, without further evidence of unsoundness of mind, does not seem fairly to fall under the censure in the text. In other kinds of murder, also, this apparent want of rational motive is of frequent occurrence; and ought, it would seem, to lead to the same conclusion. But the *danger* of acquittal on this ground, without further proof of insanity, is too obvious to require remark; and should always deter a jury from a verdict of that description, unless the circumstances be very strong and peculiar, and such as to make it impossible to suppose the existence of any rational motive for the act.

felo de se in any public highway; but he shall direct him to be interred,—without any stake being driven into his body,—in the churchyard or other burying ground; within twenty-four hours after the inquisition, and between nine and twelve at night: it being declared, however, that this shall not authorize the rites of Christian burial. As to the forfeiture, it is observable that it has relation [to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself,—the land shall be forfeited to the Crown, and the wife shall not have the survivorship. For by the act of casting himself into the water he forfeits the term, which gives a title to the Crown prior to the wife's title by survivorship; which could not accrue till the instant of her husband's death (*l*). And though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of mitigation is left in the breast of the sovereign; who upon this, (as on all other occasions,) is reminded by the oath of his office, to execute judgment in mercy.

The other species of criminal homicide is, that of killing another man. But in this there are also degrees of guilt, which divide the offence into *manslaughter* and *murder*. The difference between which, may be partly collected from what has been incidentally mentioned in the preceding articles: and principally consists in this, that manslaughter when voluntary, arises from the sudden heat of the passions; murder, from the wickedness of the heart.

First. *Manslaughter* is, therefore, thus defined (*m*): the unlawful killing of another, without malice, either express or implied (*n*); which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of

(*l*) Finch, L. 216.

(*m*) 1 Hale, P. C. 466.

(*n*) In an indictment for manslaughter the charge should be that "the defendant did feloniously kill "and slay the deceased," and it is unnecessary to set forth the manner or means. 14 & 15 Vict. c. 100, s. 4.

[some unlawful act. These were called, in the Gothic institutions, *homicidia vulgaria; quæ aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiæ calore et impetu*" (*o*); and hence it follows that in manslaughter there can be no accessories before the fact; because it must be done without premeditation.

As to the first or *voluntary* branch; if upon a sudden quarrel] in the way of chance medley (*p*), [two persons fight, and one of them kills the other, that is manslaughter; and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion (*q*), and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though he is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter (*r*). But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other, this is deliberate revenge, and not heat of blood; and accordingly amounts to murder (*s*). So if a man takes another in the act of adultery with his wife, and kill him directly on the spot; though this was allowed by the laws of Solon (*t*), as likewise by the Roman civil law, if the adulterer was found in the husband's own house (*u*), —and also among the antient Goths (*x*),—yet in England it is not absolutely ranked in the class of justifiable homicides, as in the case of forcible rape; but it is manslaughter (*y*). It is, however, the lowest degree of it; and therefore in

(*o*) Stiern. de Jure Goth. l. 3, c. 4.
(*p*) Vide sup. p. 126.
(*q*) Hawk. P. C. b. 1, c. 31, s. 29.
(*r*) Kelyng, 135.
(*s*) Fost. 296.
(*t*) Plut. in Vit. Solon.
(*u*) Ff. 48, 5, 24.
(*x*) Stiern. de Jure Goth. l. 3, c. 2.
(*y*) 1 Hale, P. C. 486.

[such a case the court directed the burning in the hand,] formerly inflicted for manslaughter and other felonies not punished with death, [to be gently inflicted; because there could not be a greater provocation (z). Manslaughter therefore on a sudden provocation, differs from excusable homicide *se defendendo*, in this; that in the one case there is an apparent necessity for self-preservation to kill the aggressor; in the other there is no necessity at all, being only a sudden act of revenge (a).

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter, in consequence of an unlawful one. As if two persons play at sword and buckler, (unless by the king's command,) and one of them kills the other; this is manslaughter, because the original act was unlawful: but it is not murder, for the one had no intent to do the other any personal mischief (b). So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection; as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter or murder, according to the circumstances under which the original act was done: if it were in a country village where few passengers are, and he call out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning (c); and murder, if he knows of their passing, and yet gives no warning at all,—for then it is malice against all mankind (d). And in general, when an involuntary killing happens in consequence of an unlawful act; it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be

(z) Sir T. Raym. 212.

(a) Vide sup. p. 127.

(b) 3 Inst. 56.

(c) Keil. 40.

(d) 3 Inst. 57.

[in prosecution of a felonious intent, or in its consequences naturally tending to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will amount only to manslaughter (*e*).

Next, as to the *punishment* of this degree of homicide: the crime of manslaughter amounts to felony (*f*):] and every person convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for a term of not less than three years; or to be imprisoned with or without hard labour for any term not exceeding four years; or to pay such fine as the court shall award (*g*).

Secondly. [We are next to consider the crime of deliberate and wilful *murder*; a crime at which human nature starts, and which is perhaps punished almost universally throughout the world with death. The words of the Mosaical law, (over and above the general precept to Noah (*h*), that "whoso sheddeth man's blood, by man "shall his blood be shed,") are very emphatical in prohibiting the pardon of murderers (*i*). "Moreover, ye shall

(*e*) Fost. 258; Hawk. P. C. b. 1, c. 31, s. 46. Homicide, however, amounts to murder, if committed in resisting an officer of justice, even though there be no felonious intent. Vide post, p. 144.

(*f*) In the particular case of manslaughter by *stabbing*, though done upon sudden provocation, the offence was formerly a *capital* felony. This was by statute 1 Jac. 1, c. 8, which provides, that when one thrusts or stabs another,—not having then a weapon drawn, or who hath not then first stricken the party stabbing,—so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. "A statute "made," says Blackstone (vol. iv. p. 193), "on account of the frequent "quarrels and stabbings with short "daggers, between the Scotch and "English at the accession of James "I." But this act was repealed (as well as the 43 Geo. 3, c. 58, and 1 Geo. 4, c. 90, s. 2, relating to the same subject) by 9 Geo. 4, c. 31. As to the existing provisions on this subject, vide post, p. 150.

(*g*) 9 Geo. 4, c. 31, s. 9; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. Besides the punishment of manslaughter considered as a crime, it is attended with a liability to make pecuniary satisfaction to the representatives of the deceased. Vide sup. vol. III. bk. v. c. VIII.

(*h*) Gen. ix. 6.

(*i*) Numb. xxxv. 31, 33.

["take no satisfaction for the life of a murderer, who is "guilty of death, but he shall surely be put to death; for "the land cannot be cleansed of the blood that is shed "therein but by the blood of him that shed it."]

[The name of *murder*, (as a crime,) was antiently applied only to the secret killing of another (*k*); which the word *moërda* signifies in the Teutonic language (*l*): and it was defined "*homicidium quod nullo vidente, nullo sciente, clam perpetratur*" (*m*); for which the vill wherein it was committed,—or, if that were too poor, the whole hundred,—was liable to a heavy amercement, which amercement itself was also denominated *murdrum* (*n*). This was an antient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood, unless they produced the murderer, to have perpetrated or at least connived at the murder (*o*); and, according to Bracton (*p*), was introduced into this kingdom by King Canute, to prevent his countrymen, the Danes, from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security to his own Normans (*q*): and therefore if, upon inquisition had, it appeared that the person found slain was an Englishman, (the presentment whereof was denominated *englescherie* (*r*),) the country seems to have been excused from this burthen. But this difference being totally abolished by statute 14 Edw. III. st. 1, c. 4, we must now (as is observed by Staundforde (*s*), define murder in quite another manner; without regarding

(*k*) Dial. de Scacc. l. 1, c. 10.

(*l*) Stiern. de Jure Sueon. l. 3, c. 3. The word *murdre* in the old statutes also signified any kind of concealment or stifling. So in the statute of Exeter, in the fourteenth year of Edward the first. "*Je riens ne celerai, ne sufferai estre celé, ne murdré,*" which is thus translated into Fleta, l. 1, c. 18, s. 4, "*Nullam veritatem celabo, nec celari permittam, nec murdrari.*" And the words "*pur murdre le droit,*" in the articles of that statute, are rendered in Fleta, ib. s. 8, "*pro jure alicujus murdrando.*"

(*m*) Glanv. l. 14, c. 3.

(*n*) Bract. l. 3, tr. 2, c. 15, s. 7; Stat. Marl. c. 26; Fost. 281.

(*o*) Stiern. l. 3, c. 4.

(*p*) L. 3, tr. 2, c. 15.

(*q*) 1 Hale, P. C. 447.

(*r*) Bract. ubi sup.

(*s*) P. C. l. 1, c. 10.

[whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction.

Murder is therefore now thus defined, or rather described, by Sir Edward Coke (*t*): "When a person of "sound memory and discretion unlawfully killeth any rea-"sonable creature in being, and under the king's peace, "with malice aforethought, either express or implied (*u*)." The best way of examining the nature of this crime, will be by considering the several branches of this definition.

First, it must be committed by a *person of sound memory and discretion;* for lunatics and infants, as was formerly observed (*x*), are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong, and of course a discretion or discernment between good and evil.

Next, it happens when a person, of such sound discretion, *unlawfully killeth.* The unlawfulness arises from killing without lawful warrant or excuse: and there must also be an actual killing, to constitute murder]; and not merely an assault with intent to kill (*y*). [The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome (*z*); and if a person be indicted for one species

(*t*) 3 Inst. 47.

(*u*) In an indictment for murder the charge should be that "the de-"fendant did feloniously, wilfully, "and of his malice aforethought, "kill and murder the deceased," and it is unnecessary to set forth the manner or means. 14 & 15 Vict. c. 100, s. 4.

(*x*) Vide sup. p. 100.

(*y*) 1 Hale, P. C. 425. As to an attempt to murder, &c., vide post, p. 148.

(*z*) It is doubtful whether by our law, the bearing false witness against another, with intent to take away his life, is murder, though he be consequently condemned and executed. (R. *v.* Macdaniel, 1 Leach, 52; 1 East, P. C. 333; 3 Inst. 48; Fost. 131.) But, as Blackstone remarks, (vol. iv. p. 196), the Gothic laws punished in this case both the judge, the witnesses and the prosecutor (Stiern. de Jure Goth. l. 3, c. 3); and among the Romans the *lex Cornelia, de sicariis,* punished the false witness with death, as being a species of assassination (Ff. 48, 8, 1); and there is no doubt, he adds, that it is equally murder *in foro conscientiæ* as killing with a sword, though there

[of killing,—as by *poisoning*,—he cannot be convicted by evidence of a totally different species of death,—as by *shooting* with a pistol, or *starving*. But where they only differ in circumstance; as if a wound be alleged to be given with a sword, and it proves to have arisen from a staff, an axe or a hatchet; this difference is immaterial (*a*). Of all species of death, the most detestable is that of poison; because it can of all others be the least prevented, either by manhood or forethought (*b*): and, therefore, by the statute 22 Henry III. c. 9, it was made treason; and a more grievous and lingering kind of death was inflicted on it than the common law allowed, namely, boiling to death (*c*); but this Act did not live long, being repealed by 1 Edward VI. c. 12.] It is to be observed, that [if a man does such an act, of which the probable consequence may be and eventually is death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended: as was the case of the unnatural son who exposed his rich father to the air against his will, by reason whereof he died (*d*); of the harlot who laid her child under leaves in an orchard, where a kite struck and killed it (*e*); and of the parish officers who shifted a child from parish to parish, till it died for want of care and sustenance (*f*). So, too, if a man hath a beast that is used to do mischief, and he, knowing it,

may be reason to forbear to punish it as such, to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions.

(*a*) 3 Inst. 135; 2 Hale, P. C. 185.

(*b*) 3 Inst. 48.

(*c*) This extraordinary punishment seems to have been adopted by the legislature, from the peculiar circumstances of the crime which gave rise to it; for the preamble of the statute informs us that John Roose, a cook, had been lately convicted of throwing poison into a large pot of broth prepared for the Bishop of Rochester's family, and for the poor of the parish; and the said John Roose was, by a retrospective clause of the same statute, ordered to be boiled to death. Lord Coke mentions several instances of persons suffering this horrid punishment. 3 Inst. 48. (Christian's Blackstone.)

(*d*) Hawk. P. C. b. 1, c. 31, s. 5.

(*e*) 1 Hale, P. C. 432.

(*f*) Palm. 545.

[*suffers* it to go abroad, and it kills a man, even this is manslaughter in the owner; but if he had purposely *turned it loose*,—though barely to frighten people and make what is called sport,—it is with us, as it is in the Jewish law (*g*), as much murder as if he had incited a bear, or a dog to worry them (*h*). If a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure;] but [it hath been holden, that if he be not a *regular* physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the least (*i*). Yet Sir Matthew Hale very justly questions the law of this determination (*k*);] though, on the other hand, it is clear that where death is occasioned by gross want of skill, or gross want of care, in the medical man (whether he be regularly licensed or not), it will amount to manslaughter (*l*). [In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which the whole day, upon which the hurt was done, shall be reckoned the first (*m*).

Further: the person killed must be a "*reasonable creature, in being, and under the king's peace*" at the time of the killing. Therefore, to kill an alien, or Jew, or an outlaw, (who are all under the king's peace and protection,) is as much murder as to kill the most regular-born Englishman, except he be an alien enemy in time of war (*n*).] To kill a child in its mother's womb is, on the other hand, not murder, but falls under a different description of crime (*o*).

(*g*) Exod. xxi. 28, 29.

(*h*) Palm. 431.

(*i*) Britt. c. 5; 4 Inst. 251.

(*k*) 1 Hale, P. C. 430. See also, in accordance with Hale and Blackstone, R. *v.* Van Butchell, 3 C. & P. 629; R. *v.* Williamson, ib. 635; R. *v.* St. John Long, 4 C. & P. 398, 423; R. *v.* Spiller, 5 C. & P. 333.

(*l*) R. *v.* St. John Long, ubi sup.; R. *v.* Spiller, ubi sup.

(*m*) Hawk. P.C. b. 1, c. 31, s. 9.

(*n*) 3 Inst. 50; 1 Hale, P. C. 433.

(*o*) 1 Hale, P.C. 433. Administering any poison or other noxious thing, or unlawfully using any in-

[Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing: and this malice prepense, *malitia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart (*q*); *un disposition à faire une male chose* (*r*); and it may be either *express* or *implied* in law. Express malice is when one, with a sedate, deliberate mind and formed design, doth kill another; which formed design is evidenced by external circumstances, discovering that inward intention;—as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm (*s*). This takes place in the case of deliberate duelling; where both parties meet avowedly with an intent] to commit homicide (*t*),—[thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow-creatures; without any warrant or authority from any power either Divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder, on them and on their seconds also (*u*). Yet it requires a great degree of passive valour to combat the dread of even undeserved contempt, arising from the false notions of honour too generally received in Europe;] and, in the opinion of Blackstone, [the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom; till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally

strument or other means to procure miscarriage, is felony by 7 Will. 4 & 1 Vict. c. 85, s. 6; (as to which, vide post, p. 153.)

(*q*) Foster, 256.

(*r*) 2 Roll. Rep. 461.

(*s*) 1 Hale, P. C. 451.

(*t*) The expression of Blackstone is "to commit murder." (4 Bl. Com. 199.) But it can hardly be said that this is "the avowed intent."

(*u*) Hawk. P. C. b. 1, c. 31, s. 31. See R. *v*. Murphy, 6 C. & P. 103; R. *v*. Young, ib. 645.

[reputable, as that which is now given at the hazard of life and fortune, as well of the party insulted, as of him who hath given the insult. Also, if, even upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia:* as when a park-keeper tied a boy that was stealing wood to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died,—these were justly held to be murders: because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter (*x*). Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief (*y*), upon a horse used to strike; or coolly discharging a gun, among a multitude of people (*z*). So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not, for this is universal malice; and if two or more come together to do an unlawful act against the peace, of which the probable consequence might be bloodshed,—as to beat a man, to commit a riot,—or to rob a park,—and one of them kills a man; it is murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand (*a*).

Also, in many cases, where no malice is expressed, the law will imply it; as where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved (*b*); and if a man kills another suddenly, without any or without a considerable provocation, the law implies malice; for no person, unless

(*x*) 1 Hale, P. C. 454, 473, 474.
(*y*) Lord Raym. 143.
(*z*) Hawk. P. C. b. 1, c. 31, s. 12.
(*a*) Ibid. s. 10.
(*b*) 1 Hale, P. C. 455.

[of an abandoned heart, would be guilty of such an act upon a slight, or no apparent, cause. No affront by words or gestures alone is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another (c). But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to chastise and not to kill him; the law so far considers the provocation of contumelious behaviour, as to adjudge it only manslaughter and not murder (d). In like manner, if one kills an officer of justice, either civil or criminal,] while resisting him [in the execution of his duty, and knowing his authority or the intention with which he interposes,] or if any of his assistants be killed under the like circumstances, [the law will imply malice, and the killer shall be guilty of murder (e);] though it is manslaughter only, if the warrant under which the officer acts be void, or be executed in an unlawful manner (f). So, in case of a sudden affray, if a third person interposes to part the combatants, giving them notice of his friendly intention, and either of the combatants kill him in resisting his interposition, it is murder (g). [And if one intends to do another felony, and undesignedly kills a man, this is also murder (h). Thus, if one shoots at A., and misses *him*, but kills B., this is murder; because of the previous felonious intent, which the law transfers from one to the other:] for the malice, as it has been sometimes expressed, *egreditur personam* (i). [The same is the case where one lays poison for A.; and B., against whom

(c) Hawk. P. C. b. 1, c. 31, s. 33; 1 Hale, P. C. 455, 456.

(d) Foster, 291.

(e) 1 Hale, P. C. 457; Hawk. P. C. b. 1, c. 31, s. 55; Foster, 270, 308, &c. As to the case of the killing of *private persons*, attempting to apprehend felons, see 2 Hale, P. C. 84; Foster, 272, 309, 318. By 7 Will. 4 & 1 Vict. c. 85, s. 4, shooting or wounding, &c. with intent to resist or prevent a lawful apprehension or detainer, is felony. Vide post, p. 152, et vide post, c. IX.

(f) Hawk. P. C. b. 1, c. 31, ss. 57, 58; Fost. 312.

(g) Fost. 272.

(h) 1 Hale, P. C. 465.

(i) Fost. 262; see Reg. v. Smith, 1 Dearsley's C. C. R. 559.

[the prisoner had no felonious intent, takes it, and it kills him; this is likewise murder (*k*). It were endless to go through all the cases of homicide which have been adjudged, either expressly or impliedly, malicious: these, therefore, may suffice for a specimen; and we may take it for a general rule that all homicide is malicious, and, of course, amounts to murder, unless where *justified* by the command or permission of the law; *excused* on account of accident or self-preservation] in sudden quarrel; [or *alleviated* into manslaughter, by being either the involuntary consequence of some act not strictly lawful, or, if voluntary, occasioned by some sudden and sufficiently violent provocation: and all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the court and jury; the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to mitigate or take away the guilt (*l*); for all homicide is supposed to be malicious, until the contrary appeareth upon evidence (*m*).

The punishment of murder, and that of manslaughter, were formerly one and the same, both having *the benefit of clergy;*] an exemption from capital punishment, in cases of capital felony, antiently allowed to criminals in holy orders,—or, what was once equivalent, able to read,—and originally allowed to these only; though afterwards extended both to clergy and laity, and confined, on the other hand, to capital felonies of the lighter kind. But benefit of clergy is now abolished by 7 & 8 Geo. IV. c. 28 (*n*); and by several statutes (*o*), it was long since taken away [from murderers through malice prepense, their abettors, procurers and counsellors;] and by 9 Geo. IV. c. 31, s. 3, it is now ex-

(*k*) 1 Hale, P. C. 466.

(*l*) Fost. 257; Hazel's case, 1 Leach, 406; R. *v.* Greenacre, 8 Car. & P. 35.

(*m*) Fost. 255.

(*n*) As to benefit of clergy, vide post, c. XXIII.

(*o*) 23 Hen. 8, c. 1; 1 Edw. 6, c. 12; 4 & 5 Ph. & M. c. 1.

pressly enacted, that every person convicted of murder shall suffer death as a felon. [In atrocious cases, it was, at one time, usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place where the fact was committed.] This direction, indeed, formed no part of the legal judgment (*p*); though at a later period it was provided, by 25 Geo. II. c. 37, and 9 Geo. IV. c. 31, that the judge might direct the body to be hung in chains. [This practice, which was quite contrary to the express command of the Mosaical law (*q*), seems to have been borrowed from the civil law; which, besides the terror of the example, gives also another reason for this practice, viz. that it is a comfortable sight to the relations and friends of the deceased (*r*).] By 25 Geo. II. c. 37, moreover, *dissection* was also required to be,—and by 9 Geo. IV. c. 31, might be,—a part of the sentence; and by the same statutes the judge was, in passing sentence, to direct the offender to be executed on the day next but one after that on which it was passed,—unless that day should happen to be Sunday, and then on the Monday following. But all these severities are now laid aside; it being provided by 6 & 7 Will. IV. c. 30 (*s*), that sentence of death, in cases of murder, may be pronounced in the same manner as in other capital cases (*t*).

(*p*) Blackstone adds (vol. iv. p. 202), "and the like is still sometimes "practised in the case of notorious "thieves." Since his time, however, this practice has been wholly discontinued.

(*q*) "The body of a malefactor "shall not remain all night upon "the tree: but thou shalt in any-"wise bury him that day, that the "land be not defiled."—Deut. xxi. 23.

(*r*) "*Famosos latrones, in his locis, ubi grassati sunt, furca figendos placuit; ut, et conspectu deterreantur alii, et solatio sit cognatis interemptorum eodem loco pœna reddita, in quo latrones homicidia fecissent.*"—Ff. 48, 19, 28, s. 15.

(*s*) By a previous act 2 & 3 Will. 4, c. 75, s. 16, so much of the sentence as regards *dissection*, had been taken away; and by 4 & 5 Will. 4, c. 26, the *hanging in chains*.

(*t*) The statutes of George the second and George the fourth above cited, had provided that the offender should be confined in some safe place within the prison, apart from all other persons, and should be fed

[By the Roman law, *parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sack, with a live dog, a cock, a viper and an ape, and so cast into the sea (*u*). Solon, however, in his laws made none against parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity (*x*). And the Persians, (according to Herodotus (*y*),) entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards.] And in like manner our English laws make no particular provision with regard to this crime, so as to distinguish it in any respect from that of simple murder (*z*). Yet formerly, where a servant killed his master, a wife her husband,—or an ecclesiastical person, (either secular or regular,) his superior, to whom he owed faith and obedience (*a*),—this was accounted [a species of treason, called *parva proditio* or petit treason (*b*);] from which it followed that, in the particular case also where a parricide was committed, by one who happened to stand in the relation of servant to his parent, he was guilty of petit treason, though the crime was so ranked under no other circumstances (*c*). For all these cases involved, in contemplation of law, not only murder (*d*), but murder aggravated by a species of treason; on account of the violation

with bread and water, except only in case of sickness; but this enactment was also repealed by 6 & 7 Will. 4, c. 30.

(*u*) Ff. 11, 9, 9.

(*x*) Cic. pro S. Roscio, s. 25.

(*y*) Clio, c. 137.

(*z*) Blackstone (vol. iv. p. 202) seems inclined to attribute the want of any distinction with regard to parricide in our law, to the same assumption on the part of its founders as is referred to in the text, viz., that of the impossibility of the crime.

(*a*) "A clergyman," says Blackstone, vol. iv. p. 203, "is understood "to owe canonical obedience to the "bishop who ordained him—to him "in whose diocese he is beneficed— "and also to the metropolitan of "such bishop,—and therefore to kill "any of these is petit treason," and cites 1 Hale, P. C. 381.

(*b*) As to petit treason, vide 25 Edw. 3, c. 2; 1 Hale, P. C. 380.

(*c*) 1 Hale, P. C. 380; 4 Bl. Com. 203.

(*d*) Foster, 107, 324, 336.

of private allegiance. [And thus in the antient Gothic constitutions, we find the breach both of natural and civil relations ranked in the same class with crimes against the state and the sovereign (*e*).] Nor was the distinction merely nominal, —the punishment being more exemplary than in the case of simple murder: the sentence for petit treason, in a man, being [to be drawn and hanged (*f*)]; and in a woman, [to be drawn and burned.] But the crime of petit treason is now abolished; it being provided by 9 Geo. IV. c. 31, s. 2, that such homicides as formerly amounted to that offence, shall be deemed in future to be murder only.

II. *Attempts to murder.*—Not only the crime of actual murder, but that of endeavouring to commit it, is by our statute law felonious; and amounts in some cases to a capital felony. By 7 Will. IV. & 1 Vict. c. 85, s. 2 (*g*), whosoever shall administer to (*h*), or cause to be taken by, any person, any poison or other destructive thing; or shall stab, cut or wound any person; or shall, by any means whatsoever, cause to any person any bodily injury dangerous to life;—with intent, in any of the cases aforesaid, to commit murder (*i*), shall be guilty of felony, and shall suffer death. And by sect. 3 of the same Act, whosoever shall attempt to administer to any person, any poison or other destructive

(*e*) "*Omnium gravissima censetur vis, facta ab incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores (et vice versâ), servis in dominos, aut etiam ab homine in semetipsum.*"—Stiernh. de Jure Goth. l. 2, c. 3.

(*f*) 1 Hale, P. C. 382: 3 Inst. 211. Blackstone (vol. iv. p. 203) remarks, that this punishment of burning, in the case of the woman, seems to be handed down to us by the laws of the antient Druids; which condemned a woman (vide Cæs. de Bell. Gall. l. 6, c. 19) to be burned for murdering her husband. It was, however, the usual punishment (until lately) for *all* treasons committed by those of the female sex. Vide post, c. VI.

(*g*) This statute repeals the provisions of 9 Geo. 4, c. 31, relative to attempts to murder.

(*h*) As to what constitutes an administration of poison, vide R. *v.* Michael, 9 Car. & P. 356.

(*i*) The jury must be satisfied of the *intention to murder*. Vide R. *v.* Cruise, 8 Car. & P. 541.

thing; or shall shoot at any person; or shall by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person; or shall attempt to drown, suffocate or strangle any person;—with intent, in any of the cases aforesaid, to commit the crime of murder, shall, although no bodily injury be effected, be guilty of felony: and he is liable to be kept in penal servitude for life or not less than fifteen years; or to be imprisoned for any term not exceeding three years, with or without hard labour and solitary confinement (*k*). By 7 Will. IV. & 1 Vict. c. 89, ss. 4, 5, whoever shall unlawfully set fire to, cast away, or in anywise destroy, any ship or vessel—either with intent to murder any person, or whereby the life of any person shall be endangered,—or shall unlawfully exhibit any false light or signal, with intent to bring any ship or vessel into danger; or shall unlawfully do anything tending to the immediate loss or destruction of any ship or vessel in distress; shall be guilty of felony, and suffer death. And by sect. 7 of the same Act, whosoever shall, by force, prevent or impede any person, endeavouring to save his life from any ship or vessel which shall be in distress, or wrecked, stranded or cast on shore (whether he shall be on board or shall have quitted the same), shall be guilty of felony: and he is liable to penal servitude for life, or not less than fifteen years; or to be imprisoned for not more than three years, with hard labour and solitary confinement, if the court shall so direct (*l*). And lastly,—by 9 & 10 Vict. c. 25, ss. 2, 7,—whoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein; or destroy or damage any building;—with intent in any of such cases to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony: and he is

(*k*) 7 Will. 4 & 1 Vict. c. 85, s. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*l*) 7 Will. 4 & 1 Vict. c. 85, ss. 4, 5; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

liable to penal servitude for life, or not less than fifteen years; or to be imprisoned for not more than three years, with or without hard labour and solitary confinement (*m*).

III. *Shooting, stabbing or wounding with intent to maim, or do grievous harm; or doing grievous bodily harm, by the explosion of gunpowder or other substances.*

[*Mayhem*,] (whence the modern term of *maim*,) was in part considered in a former volume (*n*) as a civil injury; and is [defined to be, as we may remember, the violently depriving another of the use of such of his members, as may render him the less able, in fighting, either to defend himself or to annoy his adversary;] and, (by the antient law of England,) he that maimed any man whereby he lost any part of his body, was sentenced to lose the like part, [*membrum pro membro* (*o*).] But this went afterwards out of use: so that by the common law, as it for a long time stood, [mayhem was only punishable with fine and imprisonment (*p*); unless, perhaps, the offence of mayhem by castration, which all our old writers held to be felony; "*et sequitur aliquando pœna capitalis, aliquando perpetuum exilium cum omnium bonorum ademptione*" (*q*). And this although the mayhem was committed on the highest provocation (*r*).]

By the statute law, however,—5 Hen. IV. c. 5, 37 Hen. VIII. c. 6, and 22 & 23 Car. II. c. 1 (called the Coventry

(*m*) 9 & 10 Vict. c. 25, ss. 2, 7; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*n*) Vide supra, vol. III. p. 460.

(*o*) 3 Inst. 118. "*Mes, si la pleynte soit faite de femme qu'avera tolle a home ses membres, en tiel case perdra la feme la une meyn per jugement, come le membre dount ele avera trespasse.*"—Brit. c. 55. Blackstone, (vol. iv. p. 206,) says the law of *membrum pro membro* was in his time still in use in Sweden; and cites Stiern. l. 3, p. 3.

(*p*) Hawk. P. C. b. 1, c. 44, s. 3.

(*q*) Br. l. 3, tr. 2, c. 23.

(*r*) Sir E. Coke (3 Inst. 62) has transcribed a record of Henry the third's time (Claus. 13 Hen. 3, m. 9), by which a gentleman of Somersetshire and his wife appear to have been apprehended and committed to prison, being indicted for dealing thus with John the monk, who was caught in adultery with the wife.

Act (*s*)),—specific provisions were, in course of time, made against the offence of maiming, cutting off, or disabling a limb or member (*t*). But these statutes also have been repealed, so far as regards the matter now in question (*u*): and the law now is (*v*), that whosoever unlawfully and maliciously shall shoot at any person (*x*); or shall by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person (*y*); or shall stab, cut, or wound (*z*) any person;—with intent, in any of the cases afore-

(*s*) This Act was occasioned by an assault on Sir John Coventry, in the street, and slitting his nose in revenge (as was supposed) for some obnoxious words uttered by him in parliament. 4 Bl. Com. 206.

(*t*) The Coventry Act made it a capital felony to disable with intent to maim or to disfigure. On this statute Mr. Coke, a gentleman in Suffolk, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact of slitting the nose of Mr. Crispe, Coke's brother in law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedge-bill; but he recovered. Now the bare attempt to murder was, at common law, no felony; but to disfigure, with an intent to disfigure, is made so by this statute; on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defence upon this point, that the assault was not committed with an intent to disfigure but to murder; and therefore was not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as an hedge-bill, which cannot but endanger the disfiguring him; and in such an attack happens not to kill but only to disfigure him; he may be indicted on this statute: and it may be left to the jury to determine whether it were not a design to murder by disfiguring; and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure, in order to effect their principal intent to murder; and they were both condemned and executed. (State Trials, vi. 212.)

(*u*) By 7 & 8 Geo. 4, c. 27, and 9 Geo. 4, c. 31; which latter act is itself repealed, as far as its provisions relate to this subject, by 7 Will. 4 & 1 Vict. c. 85.

(*v*) By 7 Will. 4 & 1 Vict. c. 85, s. 4.

(*x*) See Smith's case, 1 Dearsley's C. C. 559. As to shooting at, &c. vessels belonging to the navy, or in the service of the revenue, or officers in the army, navy, or marines employed in the prevention of smuggling, see 16 & 17 Vict. c. 107, s. 219.

(*y*) Vide R. *v.* Jervis, 9 Car. & P. 523.

(*z*) As to what constitutes a wounding under this provision, see Jenning's case, ib. 130; R. *v.* Smith, 8 C. & P. 173; R. *v.* Price, ib. 282; R. *v.* Sullivan, 1 Car. & M. 209; R. *v.* Bowen, ib. 149.

said, to maim, disfigure or disable such person; or to do some other grievous bodily harm to such person; or with intent to resist or prevent the lawful apprehension or detainer of any person; shall be guilty of felony: and he is liable to penal servitude for life or not less than fifteen years; or to be imprisoned for any time not exceeding three years, with or without hard labour and solitary confinement (*y*). In addition to which, it has been also provided, that if any person shall maliciously cut, stab, or wound any other person (though without such intent as above mentioned), he shall be guilty of a misdemeanor; and shall be liable to be imprisoned, with or without hard labour, for any term not exceeding three years (*z*): and that in all cases, (except those of murder and manslaughter,) where the indictment shall allege that the defendant cut, stabbed, or wounded any person, the jury, if satisfied that he is guilty of the cutting, stabbing or wounding, but not satisfied that he is guilty of the felony, may acquit him of the felony, and find him guilty of the cutting, stabbing or wounding as a misdemeanor; and he shall thereupon be liable to the same punishment, as if he had been convicted on an indictment for such misdemeanor (*a*). It is, moreover, enacted, that whoever shall unlawfully and maliciously,—by the explosion of gunpowder or other explosive substance,—burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony (*b*): and that whoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode; or shall send or deliver to, or cause to be taken or received by, any person, any explosive substance, or any other dangerous or noxious thing; or shall cast or throw at or upon, or otherwise apply to, any person any

(*y*) 7 Will. 4 & 1 Vict. c. 85, s. 4; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*z*) 14 & 15 Vict. c. 19, s. 4.

(*a*) 14 & 15 Vict. c. 19, s. 5. Prior to this Act, he would have been entitled to an acquittal, because not convicted of the felony charged.

(*b*) 9 & 10 Vict. c. 25.

corrosive fluid or other destructive or explosive substance; —with intent, in any of the cases aforesaid, to burn, maim, disfigure, or disable any person; or to do any grievous bodily harm to any person; he shall, (although no bodily injury be effected (*c*),) be guilty of felony (*d*): and for any of these felonies the offender is liable to penal servitude for life, or for any term not less than fifteen years; or to be imprisoned for any term not exceeding theee years, with or without hard labour and solitary confinement (*e*).

IV. *Procuring miscarriage.*—To kill a child in the mother's womb is, as formerly observed, no murder (*f*). It was provided, however, by 43 Geo. III. c. 58,—and afterwards by 9 Geo. IV. c. 31, s. 13,—that to administer a destructive thing to procure the miscarriage of a woman quick with child, should be a capital felony; and if she should not be proved to have been quick with child, a felony punishable with transportation. But both these provisions are now repealed (*g*); and this offence is now provided for by 7 Will. IV. & 1 Vict. c. 85, s. 6; which enacts, that whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing,—or shall unlawfully use any instrument or other means whatsoever with the like intent,—shall be guilty of felony: and he is liable to penal servitude for life or not less than fifteen years; or to be imprisoned for any term not more than three years (*h*).

(*c*) Before this statute it was a necessary ingredient in this offence with regard to *explosive substances*, that the attempt to burn, maim, &c. should have been successful. (See 7 Will. 4 & 1 Vict. c. 85, s. 4.)

(*d*) 9 & 10 Vict. c. 25, s. 4.

(*e*) 9 & 10 Vict. c. 25, s. 5; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. See also post, p. 211, as to the offence of placing gunpowder, or other explosive substance, in or near any building or vessel.

(*f*) Vide sup. p. 141.

(*g*) The former was repealed by 9 Geo. 4, c. 31, s. 1, and the provisions of this latter act itself on the subject, by 7 Will. 4 & 1 Vict. c. 85.

(*h*) 7 Will. 4 & 1 Vict. c. 85, s. 6; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. See R. v. Goodall, 2 Cox, Cr. C. 41.

V. Another offence immediately affecting the personal security of individuals, is that of the *abduction of females.* One species of this offence, [vulgarly called stealing an heiress,]—viz. carrying off any woman against her will, "having substance in goods or lands, or being heir apparent to her ancestor," (the same being followed by her marriage or defilement),—was made a capital felony by the statutes 3 Hen. VII. c. 2, and 39 Eliz. c. 9. And by statute 4 & 5 Ph. & M. c. 8, it was also an offence punishable with fine and imprisonment, for any person above the age of fourteen years to carry off any woman child, (unmarried and within the age of sixteen years,) from the possession, and against the will, of her father, mother, guardians or governors; and in case of her defilement or marriage with him, her lands were also to be forfeited to her next of kin during the life of her seducer (*i*). But all these statutes are now repealed by 9 Geo. IV. c. 31; which provides, that where any woman shall have any interest, (whether legal or equitable, present or future, absolute, conditional or contingent,) in any real or personal estate,—or shall be an heiress presumptive, or next of kin, to any one having such interest,—if any person shall, from motives of lucre (*j*), take away or detain such woman against her will (*k*), with intent to marry or defile her; or to cause her to be married or defiled by any other person; every such offender shall be guilty of felony (*l*): and he is liable to penal servitude for life, or not less than three years; or to be imprisoned, with or without hard labour, for any term not exceeding four years (*m*).

(*i*) As to the forfeiture of the property of the woman, in the case of a marriage between persons, either of whom is under age, by licence or banns procured by the false oath or fraud of one of the parties, vide sup. vol II. p. 260.

(*j*) As to what is evidence of *motives of lucre*, see R. *v.* Barratt, 9 Car. & P. 387.

(*k*) If *fraud* be used, the offender is equally within the Act, although the woman be taken away as well as married with her own consent, R. *v.* Wakefield, 2 Lewin, C. C. 279; R. *v.* Hopkins, 1 Car. & M. 254.

(*l*) 9 Geo. 4, c. 31, s. 19.

(*m*) 9 Geo. 4, c. 31, s. 19; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

And by sect. 20 of the same Act, if any person shall unlawfully take, or cause to be taken, any unmarried girl, (being under the age of *sixteen* years,) out of the possession, and against the will, of her father and mother,—or of any other person having the lawful care or charge of her, —every such offender shall be guilty of a misdemeanor; and shall be liable to suffer such punishment, by fine or imprisonment, or both, as the court shall award (*n*).

VI. Another [offence, also against the female part of the subjects of the realm, but attended with greater aggravations than that of forcible marriage, is the crime of *rape*, *raptus mulierum*, or the carnal knowledge of a woman forcibly and against her will. This, by the Jewish law (*o*), was punished with death, in case the damsel was betrothed to another man: and in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father; and she was to be the wife of the ravisher all the days of his life, without that power of divorce which was in general permitted by the Mosaic law.

The civil law (*p*) punishes the crime of ravishment with death and confiscation of goods; under which it includes both the offence of forcible abduction or taking away a woman from her friends, of which we last spoke, and also the present offence of forcibly dishonouring them; either of which, without the other, is in that law sufficient to constitute a capital crime. Also the stealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether she consent or is forced; "*sive volentibus, sive nolentibus mulieribus, tale facinus fuerit perpetratum.*" And this, in order to take away from women every opportunity of offending in

(*n*) See R. *v.* Meadows, 1 Car. & Kir. 399; R. *v.* Robins, ib. 456; Manklelow's case, 1 Dearsley's C. C. R. 159. It may be remarked, that, in these cases, the girl's *consent* is immaterial.

(*o*) Deut. xxii. 25.

(*p*) Cod. 9, tit. 13.

[this way; whom the Roman law supposes never to go astray without the seduction and arts of the other sex; and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women. "*Si enim ipsi raptores metu, vel atrocitate pœnæ, ab hujusmodi facinore se temperaverint, nulli mulieri, sive volenti sive nolenti, peccandi locus relinquetur; quia hoc ipsum velle mulierum ab insidiis nequissimi hominis, qui meditatur rapinam, inducitur. Nisi etenim eam solicitaverit, nisi odiosis artibus circumvenerit, non faciet eam velle in tantum dedecus sese prodere.*" But our English law does net entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only; and therefore makes it a necessary ingredient, in the crime of rape, that it must be against the woman's will.

Rape was punished by the Saxon laws, (particularly those of king Athelstan (*q*),) with death; which was also agreeable to the old Gothic or Scandinavian constitution (*r*). But this was afterwards thought too hard; and in its stead another severe, but not capital, punishment, was inflicted by William the Conqueror; viz., castration and loss of eyes (*s*); which continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accusations, it was then the law (*t*), that the woman should, immediately after, "*dum recens fuerit maleficium,*" go to the next town; and there make discovery to some credible persons of the injury she has suffered; and, afterwards, should acquaint the high constable of the hundred, the coroners, and the sheriff, with the outrage (*u*). This seems to correspond in some degree with the laws of Scotland and Arragon, which,] as cited by Blackstone,

(*q*) Bracton, l. iii. c. 28.

(*r*) Stiernh. de Jure Sueon. l. iii. c. 2.

(*s*) LL. Guil. Conqu. c. 19.

(*t*) The law is so laid down by Hale, in respect of appeals of rape in his time. (1 Hale, P. C. 632.) As to *appeals* (a mode of prosecution now abolished), vide post, c. XVIII.

(*u*) Glanv. l. xiv. c. 6; Bract. l. iii. c. 28.

[require that complaint must be made within twenty-four hours; though afterwards, (by statute Westm. 1, c. 13,) the time of limitation, in England, was extended to forty days. At present there is no time of limitation fixed; for, as it is usually now punished by indictment at the suit of the Crown, the maxim of law takes place that *nullum tempus occurrit regi*; but the jury will rarely give credit to a stale complaint. During the former period, also, it was held for law (*v*), that the woman, by consent of the judge and her parents, might redeem the offender from the execution of his sentence, by accepting him for her husband,—if he also was willing to agree to the exchange, but not otherwise.

In the third year of Edward the first, (by the statute Westm. 1, c. 13,) the punishment of rape was much mitigated: the offence itself of ravishing a damsel within age, that is, *twelve* years old, either with her consent or without, or of any other woman against her will, being reduced to a trespass, if not prosecuted by appeal within forty days; and subjecting the offender only to two years' imprisonment and a fine at the king's will. But this lenity being productive of the most terrible consequences, it was, in the thirteenth year of Edward the first, found necessary to make the offence of forcible rape, felony (*w*). And by statute 18 Eliz. c. 7, it was made felony without benefit of clergy.] All these enactments were afterwards repealed by 9 Geo. IV. c. 31; which however still made the offence a capital felony; but by the provisions now in force, every person convicted of the crime of rape, shall be liable to be kept in penal servitude for life (*x*).

[A male infant under the age of fourteen years, is presumed by law incapable to commit a rape; and therefore it seems cannot be found guilty of it (*y*); for though in other felonies *malitia supplet ætatem*, as has in some cases been

(*v*) Hawk. P. C. b. 1, c. 41, s. 7.

(*w*) Stat. Westm. 2, c. 34.

(*x*) 4 & 5 Vict. c. 56, s. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. The law is the same in the case of an assault with intent to commit a rape. R. *v.* Eldershaw, 3 Car. & P. 396.

(*y*) R. *v.* Jordan, 9 Car. & P. 118.

[shown, yet as to this particular species of felony, the law supposes an imbecility of body as well as mind (*z*).

The civil law seems to suppose a prostitute, or common harlot, incapable of any injuries of this kind (*a*); not allowing any punishment for violating the chastity of her who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment: it therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life (*b*); for, as Bracton well observes (*c*), "*licet meretrix fuerit antea, certe tunc meretrix non fuit, cum reclamando nequitiæ ejus consentire noluit.*"

As to the material facts requisite to be given in evidence and proved upon an indictment for rape, they are of such a nature that, though necessary to be known and settled for the conviction of the guilty and preservation of the innocent,—and therefore to be found in such criminal treatises as discourse of these matters in detail (*d*),]—yet it is not desirable to discuss them here. We [shall therefore merely add upon this head, a few remarks from Sir Matthew Hale with regard to the competency and credibility of witnesses, which may, *salvo pudore*, be considered.

And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony and how far she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offence and made search for the offender; if the party accused fled for it;—these and the like are concurring circumstances, which give greater probability to her evidence. But on the other

(*z*) 1 Hale, P. C. 631.

(*a*) Cod. 9, 9, 22; Ff. 47, 2, 39.

(*b*) 1 Hale, P. C. 629; Hawk. P. C. b. 1, c. 41, s. 2.

(*c*) L. 3, c. 27.

(*d*) See 9 Geo. 4, c. 31, s. 18.

[side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed, was where it was possible she might have been heard and she made no outcry;—these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.] It is to be observed, that she is not compellable, on her examination, to answer the question whether she has not had connection with other men (*e*); nor is the accused at liberty to prove that this has been the case (*f*). He is allowed however to show that he had himself had connection with her before the alleged rape, or that her character for chastity or decency is notoriously bad (*g*).

[Moreover, if the rape be charged to be committed on an infant under twelve years of age (*h*), she may still be a competent witness if she hath sense and understanding to know the nature and obligations of an oath, or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by Sir M. Hale (*i*) that she ought to be heard without oath, to give the court information: and others have held that what the child told her mother or other relations may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled (*k*) that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath; and that there is no determinate age at which the oath of a child ought either to be admitted or rejected. Yet where the evidence of children is ad-

(*e*) R. *v.* Hodgson, R. & R. C. C. 211.

(*f*) Ibid.; R. *v.* Barker, 3 Car. & P. 589; Stark. Ev. 1269.

(*g*) Ibid.; Stark. Ev. 1269, 1270.

(*h*) Independently of rape, the carnal knowledge of the child would in this case be a misdemeanor. (*Vide post*, p. 160, as to *abusing children*.)

(*i*) 1 Hale, P. C. 634.

(*k*) R. *v.* Brasier, 1 Leach, C. L. 237.

[mitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place and circumstances; in order to make out the fact, and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion.] For in this, as in other cases, a witness may be [competent, that is, may be admitted to be heard, and yet, after being heard, may prove not to be credible or such as the jury is bound to believe; for one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact (*l*).

"It is true," says the learned judge just referred to (*m*), "that rape is a most detestable crime, and therefore ought "severely and impartially to be punished with death; but "it must be remembered that it is an accusation easy to be "made, and hard to be proved, but harder to be defended "by the party accused, though innocent" He then relates two very extraordinary cases of malicious prosecution for this crime that had happened within his own observation, and concludes thus: "I mention these instances that we "may be the more cautious upon trials of offences of this "nature, wherein the court and jury may with so much ease "be imposed upon without great care and vigilance; the "heinousness of the offence many times transporting the "judge and jury with so much indignation, that they are "over hastily carried to the conviction of the person ac-"cused thereof, by the confident testimony of sometimes "false and malicious witnesses."]

VII. Next to rape may be classed the crime of *abusing children*; whether with their consent or without: for, first, it is enacted, that if any person shall unlawfully and

(*l*) The remarks here made are equally applicable to the case where a party is charged with the crime next mentioned, viz. that of abusing a child.

(*m*) 1 Hale, P. C. 635.

carnally know and abuse any girl *under* the age of ten years, every such offender shall be guilty of felony (*n*); and he is liable to penal servitude for life (*o*): and, secondly, that if any person shall unlawfully and carnally know and abuse any girl above the age of ten years, and under the age of twelve years, every such offender shall be guilty of a misdemeanor (*p*); and shall be liable to be imprisoned, with or without hard labour, for such time as the court shall award (*q*).

VIII. What has been observed in the case of rape,—[especially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more detestable,—may be applied to another offence, of a still deeper malignity, the infamous *crime against nature*, committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself.

We will not act so disagreeable a part as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more expedient to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to

(*n*) 9 Geo. 4, c. 31, s. 17.

(*o*) 4 & 5 Vict. c. 56, s. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to this crime, see R. *v.* Hughes, 1 Cox, Cr. C. 247; R. *v.* Ashbolt, 2 Cox, Cr. C. 115; R. *v.* Holcroft, 2 Car. & Kir. 341. By 18 Eliz. c. 7 (repealed by 9 Geo. 4, c. 31), and also by 9 Geo. 4, c. 31, it was made a *capital* felony to know and abuse any girl under the age of ten years.

(*p*) 9 Geo, 4, c. 31, s. 17. As to this, see R. *v.* Martin, 9 Car. & P. 213; 2 M. C. C. R. 123; R. *v.* Neale, 1 Car. & Kir. 591.

(*q*) By 14 & 15 Vict. c. 100, s. 29, in case of any *attempt* to have carnal knowledge of a girl under twelve years of age, the offender may be sentenced to be imprisoned for any term warranted by law; and also to be kept to hard labour during the whole or any part of such term.

[be named; "*peccatum illud horribile, inter Christianos non nominandum* (r)." A taciturnity observed likewise by the edict of Constantius and Constans (s); "*ubi scelus est id quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis pœnis subdantur infames qui sunt, vel qui futuri sunt, rei.*"

Its punishment the voice of nature and of reason, and the express law of God (t), determine to be capital; of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven; so that this is an universal, not merely a provincial, precept; and our autient law in some degree imitated this punishment, by commanding such miscreants to be burnt to death (u), though it is said in Fleta (x) they should be buried alive; either of which punishments was indifferently used for this crime among the antient Goths (y).] In our own country [this offence, (being in the times of popery only subject to ecclesiastical censures,) was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6, (revived and confirmed by 5 Eliz. c. 17),] and is now a capital offence; it being enacted by 9 Geo. IV. c. 31, s. 15, that every person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall suffer death as a felon (z). [And the rule of law herein is, that, if both are arrived at years of discretion, *agentes et consentientes pari pœnâ plectantur* (a).]

IX. *Fraudulently procuring the defilement of young females.* By 12 & 13 Vict. c. 76, if any person shall by

(r) See in Rot. Parl. 50 Edw. 3, n. 58, a complaint that a Lombard did commit the sin "that was not to be named." 12 Rep. 37.

(s) Cod. 2, 9, 31.

(t) Levit. xx. 13, 15.

(u) Brit. c. 9.

(x) L. 1, c. 37.

(y) Stiern. de Jure Goth. l. 3, c. 2.

(z) As to the nature of the proof to be given, see 9 Geo. 4, c. 31, s. 18.

(a) 3 Inst. 59.

false pretences, false representations, or other fraudulent means, procure any woman or child under twenty-one years to have illicit carnal connection with any man; such person shall be guilty of a misdemeanor, and liable to imprisonment for a term, not exceeding two years, with hard labour.

X. *Administering chloroform, or other stupifying thing, with felonious intent.* By 14 & 15 Vict. c. 19, s. 3, it is provided, that if any person shall unlawfully apply or administer, or attempt to apply or administer, to any other person, any chloroform, laudanum, or other stupifying or overpowering drug or thing, with intent to enable the offender, or any other person, to commit any felony, every such offender shall be guilty of felony: and he is liable to penal servitude for life, or not less than three years; or to be imprisoned, with or without hard labour, for any term not exceeding three years (*b*)

XI. *Kidnapping and child stealing.* [The forcible abduction or stealing away of a man, woman or child from their own country, and sending them into another, was capital by the Jewish law (*c*). "He that stealeth a man "and selleth him, or if he be found in his hand, he shall "surely be put to death." So likewise in the civil law, the offence of spiriting away and stealing men and children,— which was called *plagium*, and the offenders *plagiarii*,— was punished with death (*d*). This is unquestionably a very heinous crime, as it robs the sovereign of his subjects, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships; and therefore the common law of England punished it with fine and imprisonment (*e*).] With respect to the stealing of children, it is provided by 9 Geo. IV.

(*b*) 14 & 15 Vict. c. 19, s. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*c*) Exod. xxi. 16.

(*d*) Ff. 48, 15, 1.

(*e*) Raym. 474; 2 Show. 221; Skin. 47; 4 Bl. Com. 219.

c. 31, s. 21, that if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of *ten* years (*f*), with intent to deprive the parent or parents, or other person having the lawful charge of such child, of the possession of such child, or with intent to steal any article on its person; or shall, with any such intent as aforesaid, receive or harbour such child, knowing the same to have been so stolen or enticed;—every such offender shall be guilty of felony: and he is liable to penal servitude for not more than seven or less than three years, or to be imprisoned, with or without hard labour for any term not more than two years, and also, if a male, to be whipped, if the court shall so think fit (*g*).

XII. *Attempts to endanger railway passengers.* By 14 & 15 Vict. c. 19, ss. 6, 7, if any person shall maliciously place or throw on or across a railway any wood, stone or other thing; or displace any rail or thing, or turn any point of machinery belonging to a railway; or show or remove any signal or light; or do any other thing, with intent, in any of the cases aforesaid, to obstruct or injure a railway engine or carriage, or endanger the safety of any person travelling or being on a railway: or shall maliciously throw against or into any railway engine or carriage any wood, stone or other thing,—with intent to endanger the safety of any person being in or upon the same:—he shall, in any of the above cases, be guilty of felony: and he is liable to penal servitude for life, or not less than three years; or to be imprisoned, with or without hard labour, for any term not exceeding three years (*h*).

XIII. *Setting spring-guns or engines to destroy or injure trespassers.* By 7 & 8 Geo. IV. c. 18, s. 1, it is enacted (*i*),

(*f*) As to the abduction of *an unmarried girl under the age of sixteen*, vide sup. p. 155.

(*g*) 9 Geo. 4, c. 31, s. 21; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*h*) 14 & 15 Vict. c. 19, ss. 6, 7; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*i*) Prior to this Act, a man was not indictable for the mere act of

that if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, such person shall be guilty of a misdemeanor; as to the punishment of which kind of offence, (where none is provided by statute in the particular case,) we may take occasion to remark here, that at common law it always consists of fine or imprisonment, or both, at the discretion of the court.

In the same statute there is, however, contained a proviso, that the said enactment shall not extend to gins or traps such as are usually set with the intent of destroying vermin; or to spring-guns, or other engines, set in a dwelling-house for the protection thereof from sunset to sunrise.

XIV. The remaining offences which fall under this head are, *assaults, batteries*, and *false imprisonment*. With regard to the nature of these offences in general, we have nothing further to add to what has been already observed in the preceding book of these Commentaries; [when we considered them as civil injuries, for which a satisfaction is given to the party aggrieved (*k*). But taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable] as misdemeanors, [and punishable with fines and imprisonment;] and in a severer manner and degree, [when they are committed with any very atrocious design,—as in case of an assault with intent to murder (*l*),] or with an intent to commit rape or an unnatural crime,

placing such instruments on his premises with intent to destroy trespassers, at least if he gave sufficient notice to the public that they were so placed. (Elott *v.* Wilks, 3 B. & Ald. 312, 314.) As to the right of *action* by a person who sustains injury from an engine of this description, see Jordan *v.* Crump, 8 Mee. & W. 782, and the cases there cited.

(*k*) Vide sup. vol. III. bk. v. c. VIII.

(*l*) Vide sup. p. 148.

[for which intentional assaults, in the two last cases, indictments are much more usual than for the absolute perpetration of the facts themselves, on account of the difficulty of proof; or when both parties are consenting to an unnatural attempt, it is usual not to charge any *assault*, but that one of them laid hands on the other with intent to commit, and that the other permitted the same with intent to suffer the commission of, the abominable crime before mentioned (*m*).]

There are also some other species of aggravated assaults, against which provision is expressly made by act of parliament. Thus an assault with an intent to commit any felony (*n*); a malicious assault inflicting grievous bodily harm (*o*); as well as assaults committed in a variety of other specific cases in the several statutes enumerated;—are punishable, in some instances, by fine or imprisonment, or both, and in others by imprisonment, with or without hard labour (*p*). And in the particular cases of assaults on magistrates and others, employed in preserving wrecks or

(*m*) By 14 & 15 Vict. c. 100, s. 29, in case of an indecent assault, the offender may be sentenced to be imprisoned for any term warranted by law; and also to be kept to hard labour during the whole or any part of such term.

(*n*) 9 Geo. 4, c. 31, s. 25.

(*o*) 14 & 15 Vict. c. 19, s. 4. As to assaults which involve a malicious stabbing and wounding, but fall short of felony, vide sup. p. 152.

(*p*) See 7 & 8 Geo. 4, c. 29, s. 29; R. *v.* Hale, 2 Car. & Kir. 326, as to assaults on deerkeepers: 9 Geo. 4, c. 31, s. 23, as to arresting clergymen on civil process going to or returning from divine service; sect. 25, as to assaults on peace officers, or with intent to resist lawful apprehension or detainer, or in pursuance of a conspiracy to raise wages; sect. 26, as to assaults on seamen, keelmen or casters, to obstruct the buying and selling of grain, &c.: 6 & 7 Will. 4, c. 50, s. 4, as to assaulting or resisting a metropolitan police patrol: 5 & 6 Vict. c. 29, s. 21, as to assaults by convicts on the officers of Pentonville Prison: 6 & 7 Vict. c. 26, s. 19, as to assaults by convicts on the officers of the Millbank Prison: 13 & 14 Vict. c. 101, s. 9, as to assaults on workhouse or relieving officers: 14 & 15 Vict. c. 11, as to assaulting servants or apprentices so as to endanger life, &c. (vide sup. vol. II. p. 243): 14 & 15 Vict. c. 100, s. 29, as to assaults occasioning actual bodily harm; 17 & 18 Vict. c. 104, s. 206, as to masters of British ships wrongfully forcing a seaman or apprentice ashore, or leaving him behind, &c.

vessels in distress (*q*); or on custom-house officers, or others, employed for prevention of smuggling (*r*); or on persons authorized to seize poachers (*s*),—the offenders are punishable with imprisonment, or with penal servitude for three years (*t*).

(*q*) 9 Geo. 4, c. 31, s. 24. (See 20 & 21 Vict. c. 3.)

(*r*) 16 & 17 Vict. c. 107, s. 251. (See 20 & 21 Vict. c. 3.)

(*s*) 9 Geo. 4, c. 69, s. 2. (See 20 & 21 Vict. c. 3.)

(*t*) As to the disposal of assault cases in a summary way before justices, vide 9 Geo. 4, c. 31, s. 27; 14 & 15 Vict. c. 55, s. 3; 16 & 17 Vict. c. 30; et post, chapter on Summary Convictions.

CHAPTER V.

OF OFFENCES AGAINST PROPERTY.



The next class of offences that we propose to consider are such as affect *property*; in considering which we shall notice, first, the habitations of individuals; and, next, property in general: and, as regards property in general, shall arrange the different offences under the general heads of larceny; malicious mischief; forgery; obtaining property by false personation; and obtaining property by false pretences.

And, first, with respect to offences against the habitations of individuals.

1. *Arson, ab ardendo,* (as it stood at common law, and independently of the provisions of recent acts of parliament to be presently referred to,) is [the malicious and wilful burning of the house or outhouse of another man. This is an offence of very great malignity, and much more pernicious to the public than simple theft; because, first, it is an offence against that right of habitation which is acquired by the law of nature, as well as of the laws of society; next, because of the terror and confusion that necessarily attends it; and, lastly, because in simple theft the thing stolen only changes its master, but still remains *in esse* for the benefit of the public: whereas, by burning, the very substance is absolutely destroyed. It is also frequently more destructive than murder itself, of which, too, it is often the cause: since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too

[frequently involves, in the common calamity, persons unknown to the incendiary, and not intended to be hurt by him; and friends as well as enemies. For which reason the civil law punishes with death such as maliciously set fire to houses in towns and contiguous to others; but is more merciful to such as only fire a cottage or house standing by itself (*a*).

Our English law also distinguishes with much accuracy upon this crime; and, therefore, we will inquire, first, what is such a house as may be the subject of this offence; next, wherein the offence itself consists, or what amounts to a burning of such house; and, lastly, how the offence is punished.

Not only the bare dwelling-house, but all outhouses that are parcel thereof,—though not contiguous thereto, nor under the same roof,—as barns and stables, may be the subject of arson (*b*): and this by the common law; which also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel of the dwelling-house (*c*). The burning of a stack of corn was antiently likewise accounted arson (*d*):] but these two last offences are now the subject of special provision by the statute law (*e*), of which notice will be taken in its proper place (*f*). [The offence of arson, strictly so called, may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's (*g*). For, by the common law, no intention to commit a felony, amounts to the same crime; though it does, in some cases, by particular statutes. However, such wilful firing one's own house, *in a town*, is a high misdemeanor; and punishable by fine, imprisonment, and per-

(*a*) Ff. 18, 19, 28, s. 12.
(*b*) 1 Hale, P. C. 567.
(*c*) 3 Inst. 67.
(*d*) Hawk. P. C. b. 1, c. 39, s. 2.
(*e*) 7 Will. 4. & 1 Vict. c. 89, s. 10, and 7 & 8 Vict. c. 62.
(*f*) Vide post, p. 172.
(*g*) Cro. Car. 377; 1 Jon. 351.

[petual sureties for the good behaviour (*h*): and, if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from himself, or from those whose estate he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant (*i*).

As to what shall be said to be a *burning* so as to amount to arson, a bare intent, or attempt to do it, by actually setting fire to a house, unless it absolutely burns, does not fall within the description of *incendit et combussit;* which were words necessary, in the days of law-Latin, to all indictments of this sort (*k*); but the burning and consuming of any part is sufficient, though the fire be afterwards extinguished (*l*). Also it must be a *malicious* burning, otherwise it is only a trespass; and, therefore, no negligence or mischance amounts to it (*m*).

The *punishment* of arson was death by our antient Saxon laws (*n*); and in the reign of Edward the first this sentence was executed by a kind of *lex talionis;* for the incendiaries were burnt to death (*o*), as they were also by the Gothic constitutions (*p*). The statute 8 Henry VI. c. 6, made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason; but it was again reduced to felony, by the general acts of Edward the sixth and Queen Mary.] Moreover [the offence of arson was denied the benefit of clergy by statute 23 Henry VIII. c. 1, but that statute was repealed by 1 Edward VI. c. 12: and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduction from the statute 4 & 5

(*h*) 1 Hale, P. C. 568; Hawk. P. C. b. 1, c. 39, s. 3, ubi sup.; 2 East, P. C. c. 21, s. 7.

(*i*) Fost. 115.

(*k*) R. *v.* Russell, 1 Car. & M. 541.

(*l*) Hawk. P. C. b. 1, c. 39, ss. 16, 17.

(*m*) 1 Hale, P. C. 569.

(*n*) LL. Inæ, c. 7.

(*o*) Britt. c. 9.

(*p*) Stiern. De Jure Goth. l. 3, c. 6.

[Ph. & M. c. 4, which expressly denied it to an accessory before the fact (*q*).]

According to the statutes now in force, every person convicted of the offence of arson is liable to penal servitude for not more than seven or less than three years; or to be imprisoned for not more than two years; and to such imprisonment may be added, at the discretion of the court, hard labour or solitary confinement, and, in the case of males, whipping (*r*).

The offence which we have here described is that of arson as it stood at *common law*; but the doctrines of the common law on this subject have now lost much of their importance, this species of mischief being specially provided against by statutes of modern date, embracing almost every case of arson. These provisions are as follows.

By 7 Will. IV. & 1 Vict. c. 89, s. 2 (*s*), whoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and shall suffer death (*t*). Also, by the same statute and section, whosoever shall unlawfully and maliciously set fire to any church or chapel; or to any chapel for the religious worship of persons dissenting from the United Church of England and Ireland; or to any house, stable, coach-house, outhouse (*u*), warehouse, office, shop, mill, malthouse, hop-oast, barn or granary; or to any erection used in carrying on any trade or manufacture, or any branch thereof, whether in possession of the offender or any other person;—with intent, in any of the cases aforesaid, to injure or defraud any person, shall be guilty of felony: and he is liable to penal servitude for life, or not less than fifteen

(*q*) 11 Rep. 35; 2 Hale, P. C. 346, 347; Fost. 336; and see 9 Geo. 1, c. 22, now repealed by 7 & 8 Geo. 4, c. 27.

(*r*) 7 & 8 Geo. 4, c. 28, s. 8; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*s*) Repealing 7 & 8 Geo. 4, c. 30, s. 2.

(*t*) R. *v.* Paice, 1 Car. & Kir. 73.

(*u*) As to what is an "outhouse" under this provision, see R. *v.* James, 1 Car. & Kir. 303; R. *v.* England, ibid. 533.

years; or imprisonment not exceeding three years (x). and doubts having been conceived upon this Act, whether its provisions extended to the setting fire to a hove or shed not appendant to any house, it was afterward provided by 7 & 8 Vict. c. 62, that whoever shall unlawfully and maliciously set fire to any hovel, shed (y) o fold; or to any farm-building; or any building or erectioi used in farming land;—whether the same, or any of then respectively, shall then be in the possession of the offender or the possession of any other person,—with intent thereb to defraud any person, shall be guilty of felony; and he i liable to a like punishment. Moreover, that whoever shal unlawfully and maliciously set fire to any hay, straw, wood or other vegetable produce, being in any farm-house oı farm building; or to any implement of husbandry, being ii any farm-house or farm-building, with intent to set fire t such farm-house or farm-building, and to injure or defrauc any person,—shall be liable to the same punishment, as fo setting fire to the farm-house or farm-building itself: an every male so offending, under eighteen, shall be also liable at the discretion of the court, in addition to any othe sentence, to be whipped (z). Again; unlawfully and maliciously, by any overt act, to *attempt* to set fire to any building, stack, or steer, or vegetable produce, of such kin and with such intent that if the offence were complete, th offender would be guilty of felony, and liable to penal servitude for life, (though such building, stack, steer, o vegetable produce be not actually set on fire,) is deeme felony: and is punishable with penal servitude for fifteen years; or imprisonment for two years, with the sam addition in respect to whipping, if the offender be a mal under eighteen (a). And, lastly, if any person shall maliciously set fire to any station or other building belonging to any railway, dock, canal or other navigation, he is guilty

(x) 7 Will. 4 & 1 Vict. c. 89, s. 2; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(y) See Queen v. Amos, 20 L. J. M. C. 103.

(z) 7 & 8 Vict. c. 62, s. 2. Se R. v. Baldock, 2 Cox, Cr. C. 55.

(a) 9 & 10 Vict. c. 75, s. 7; 1 & 17 Vict. c. 99; 20 & 21 Vict. c. 3

of felony: and he is liable to penal servitude for life, or any term not less than three years; or to be imprisoned, with or without hard labour, for any term not exceeding three years (*b*): and, if any person shall maliciously set fire to any *goods or chattels*, being in any building the setting fire to which is made felony by act of parliament, he is guilty of felony: and he is liable to penal servitude for any term not exceeding ten years, nor less than three years; or to be imprisoned, with or without hard labour, for any term not exceeding three years (*c*).

II. *Negligently setting fire to houses and buildings by servants.*

By 14 Geo. III. c. 78, s. 84, if any servant, through negligence or carelessness, shall fire, or cause to be fired, any dwelling-house or out-houses, or other buildings; and be thereof convicted on the oath of one witness, before two or more justices; he shall forfeit 100*l.*, to be distributed among the sufferers, by the churchwardens, in such proportions as to such churchwardens shall seem just; and, in case of default, shall be committed to gaol or the house of correction for eighteen months, to be kept to hard labour (*d*).

III. [*Burglary*, or nocturnal housebreaking, *burgi latrocinium*, which by our antient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence.] For it obviously involves many of the same circumstances of atrocity that belong to arson; as infringing both upon the right of habitation, and in general also upon the right of property; as occasioning a frightful alarm, and as leading by natural consequence to murder. Its malignity also is the more strongly illustrated,

(*b*) 14 & 15 Vict. c. 19, s. 8; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*c*) Ibid.

(*d*) As to this enactment, see Filiter *v.* Phippard, 11 Q. B. 347. By 14 Geo. 3, c. 78, a similar provision contained in 6 Ann. c. 31, is repealed.

by considering how [particular and tender a regard] is paid by the law of England [to the immunity of a man's house; which it styles his castle, and will never suffer to be violated with impunity: agreeing herein with the sentiments of antient Rome, as expressed in the words of Tully (*e*), "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*" For this reason no outward doors can, in general, be broken open to execute any civil process; though in criminal cases the public safety supersedes the private. Hence also, in part arises the animadversion of the law upon eaves-droppers, nuisancers and incendiaries; and to this principle it must be assigned, that a man may assemble people together lawfully, (at least if they do not exceed eleven,) without danger of raising a riot, rout or unlawful assembly, in order to protect and defend his house (*f*); which he is not permitted to do in any other case.

The definition of a burglar, as given us by Sir Edward Coke (*g*), is "he that by night breaketh and entereth into "a mansion-house, with intent to commit a felony."] In which, however, we are to understand, as it would seem, the mansion-house of another person; for a man cannot be guilty of burglary in his own house (*h*). [In this definition there are four things to be considered—the *time*, the *place*, the *manner*, and the *intent*.

The *time* must be by night, and not by day: for in the daytime there is no burglary (*i*). We have seen (*k*), in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allow-

(*e*) Pro Domo, 41.

(*f*) 1 Hale, P. C. 547. As to riots, routs, and unlawful assemblies, vide post, c. VI.

(*g*) 3 Inst. 63.

(*h*) 2 East, P. C. c. 15, s. 18.

(*i*) The beaking and entering a dwelling house by day, to steal property therein, amounts, however, by 7 & 8 Geo. 4, c. 29, to a felony. (Vide post, p. 192.) And the breaking and entering it by day with intent to commit any felony, though none is actually committed, is a misdemeanor. R. *v.* Lawes, 1 Car. & Kir. 62.

(*k*) Vide sup. p. 122.

[ing the party attacked by night to kill the assailant with impunity. As to what is reckoned night and what day for this purpose,—antiently the day was accounted to begin only at sunrising, and to end immediately upon sunset;] but the better opinion afterwards was, that if there were daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it was no burglary (*l*). But this did not extend to moonlight, for then many midnight burglaries would have gone unpunished; [and besides the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night, when all the creation are at rest.] But the doctrines of the common law on this subject are no longer of practical importance, it being provided by 7 Will. IV. & 1 Vict. c. 86, s. 4, that as regards the offence in question, the night shall be considered as commencing at nine in the evening, and concluding at six in the morning of the next day (*m*).

[As to the *place*. It must be, according to Sir E. Coke's definition, in a *mansion*-house; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei* (*n*). But it does not seem absolutely necessary that it should, in all cases, be a mansion-house; for it may also be committed by breaking the gates or walls of a *town* in the night (*o*); though that perhaps Sir Edward Coke would have called, the mansion-house of the garrison or corporation. Spelman defines burglary to be "*nocturna diruptio alicujus habitaculi, vel ecclesiæ, etiam murorum portarumve civitatis aut burgi, ad feloniam aliquam perpetrandam.*" And therefore we may safely conclude that the requisite of its being *domus mansionalis*, is only in the burglary of a private house, which is the most frequent; and in which it is indispensably necessary, to form its guilt,

(*l*) 3 Inst. 63; 1 Hale, P. C. 550; Hawk. P. C. b. 1, c. 38, s. 2.

(*m*) See R. *v.* Polly, 1 Car. & Kir. 77.

(*n*) 3 Inst. 64.

(*o*) Spelm. Gloss. tit. "Burglary;" Hawk. P. C. b. 1, c. 38, s. 10.

[that it must be in a mansion or dwelling-house; for no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle or defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi*, is the object of burglary, though no one be in it at the time of the fact committed (*p*).] And it was formerly the rule, that if the barn, stable, or warehouse were parcel of the mansion-house, and within the same common fence (*q*), (though not under the same roof, or contiguous,) a burglary might be committed therein; for the capital house protected and privileged all its branches and appurtenances, if within the curtilage or homestall. But now by 7 & 8 Geo. IV. c. 29, s. 13, it is provided, that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be a part of such dwelling-house for the purpose of burglary, unless there shall be a *communication* between such building and dwelling-house; either immediate, or by means of a covered and inclosed passage leading from one to the other (*r*). [A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is to all other purposes, as well as this, the mansion-house of the owner (*s*). So also is a room or lodging in any private house the mansion for the time being of the lodger, if the owner doth not himself dwell in the house, or if he and his lodger enter by different outward doors (*t*); but if the owner himself lies in the house, and hath but one outward

(*p*) 1 Hale, P. C. 556; Fost. 77.

(*q*) R. *v.* Garland, 1 Leach, C. L. 171.

(*r*) See R. *v.* Higgs, 2 Car. & Kir. 322. By the same statute, however, (sect. 14,) the breaking and entering of a building within the curtilage, but not communicating, and stealing therein, is more penal than a simple felony. Vide post, p. 192.

(*s*) 1 Hale, P. C. 556; Hawk. P. C. b. 1, c. 38, s. 13.

(*t*) See R. *v.* Rogers, 1 Leach, C. C. 89; R. *v.* Trapshaw, ibid. 427;

[door at which he and his lodgers enter, such lodgers seem only to be inmates; and all their apartments, to be parcel of the one dwelling-house of the owner (*u*). Thus, too, the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers (*x*). But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there, it is no dwelling-house, nor can burglary be committed therein; for by the lease it is severed from the rest of the house, and therefore it is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein, when I never lie there (*y*). Neither can burglary be committed in a tent or booth erected in a market or fair, though the owner may lodge therein (*z*); for the law regards thus highly nothing but permanent edifices—a house or church, the wall or gate of a town: and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon under the same circumstances.

As to the *manner* of committing burglary, there must be both a breaking and an entry to complete it: but they need not be both done at once (*a*); for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars (*b*). There must in general be an actual breaking,—not a mere legal *clausum fregit*, by leaping over invisible, ideal boundaries, which may constitute a civil trespass, but a substantial and forcible irruption,—as at least by breaking, or taking out the glass of, or otherwise opening, a window; picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner hath pro-

(*u*) Kel. 84; 1 Hale, P. C. 556.

(*x*) Fost. 38, 39; 2 East, P. C. c. 15, s. 14.

(*y*) 1 Hale, P. C. 558.

(*z*) Hawk. P. C. b. 1, c. 38, s. 17.

(*a*) R. *v.* Bird, 9 Car. & P. 44; R. *v.* Smith, R. & R. C. C. 417.

(*b*) 1 Hale, P. C. 551.

[vided. But if a person leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary; yet if he afterwards unlocks an inner or chamber door, it is so (*c*). But to come down a chimney is held a burglarious entry, for that is as much closed as the nature of things will admit. So also to knock at a door, and upon opening it to rush in with a felonious intent; or under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house: all these entries have been adjudged burglarious, though there was no actual breaking: for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process (*d*). And so if a servant opens and enters his master's chamber door, with a felonious design; or if any other person lodging in the same house, or in a public inn, opens and enters another's door with such evil intent; it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both (*e*); for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it with any part of the body, or with an instrument held in the hand, is sufficient; as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries (*f*). The entry may be before the breaking as well as after;] for though there were once different opinions upon the question,

(*c*) 1 Hale, P. C. 553.

(*d*) Hawk. P. C. b. 1, c. 38, s. 5.

(*e*) Cornwall's case, Stra. 881; 1 Hale, P. C. 553.

(*f*) 1 Hale, P. C. 555; Hawk. P. C. b. 1, c. 38, s. 7; Fost. 108. As to what entries *are* burglarious, see the following cases; R. *v.* Bailey, R. & R. C. C. 341; R. *v.* Russell, 1 M. C. C. R. 377; R. *v.* Davis, R. & R. C. C. 355; R. *v.* Brice, ib. 450; R *v.* Haines, ib. 151. As to what are *not* burglarious, see R. *v.* Lawrence, 4 Car. & P. 231; R. *v.* Smith, R. & M. C. C. R. 178; R. *v.* Rust, ib. 183; R. *v.* Roberts, Car. C. L. 293.

whether breaking *out* of a house to escape, by a man who had previously entered by an open door with intent to steal, were burglary, [Lord Bacon (*g*) holding the affirmative and Sir Matthew Hale (*h*) the negative,] it is now enacted by 7 & 8 Geo. IV. c. 29, s. 11, (as it had previously been by stat. 12 Anne, c. 7, now repealed (*i*),) that if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house, in the night time, such person shall be deemed guilty of burglary. [But it is universally agreed that there must be both a breaking, either in fact or by implication, and also an entry,—in order to complete the burglary.

As to the *intent*. It is clear that] (except in the particular cases specified in the statute of George the fourth, just cited, where felony is connected with the crime in a different manner,) [such breaking and entry must be with a felonious intent, otherwise it is only a trespass (*k*). And it is the same whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary, whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law or only created so by statute,—since that statute which makes an offence felony, gives it incidentally all the properties of a felony at common law.

Thus much for the nature of burglary, which was a felony, at common law (*l*), but within the benefit of clergy.

(*g*) Bac. Elem. 65; et vide 2 East, P. C. c. 15, s. 6.

(*h*) 1 Hale, P. C. 554.

(*i*) By 7 & 8 Geo. 4, c. 27.

(*k*) 1 Hale, P. C. 561.

(*l*) Blackstone remarks, (vol. iv. p. 227,) that by the laws of Athens, which punished no simple theft with death, burglary was a capital crime, and cites Pott. Antiq. b. i. c. 26.

[The statutes, however, of 1 Edw. VI. c. 12 and 18 Eliz. c. 7, took away clergy from the principals; and that of 3 & 4 W. & M. c. 9, from all abettors and accessories before the fact.] And though these provisions are all now repealed (*m*), yet by those now in force, whosoever shall burglariously break and enter into any dwelling-house, and shall assault with intent to murder any person being therein; or shall stab, cut, wound, beat, or strike any such person; shall be guilty of felony and suffer death (*n*): and whosoever shall be convicted of the crime of burglary, shall be liable to penal servitude for life, or any term not less than ten years; or to be imprisoned for any term not more than three years; and, in the case of imprisonment, hard labour and solitary confinement may be superadded (*o*).

In connection with the crime of burglary it may be mentioned, that any person found *by night*, armed with any dangerous or offensive weapon or instrument, with intent to enter any buildings, and to commit felony therein (*p*): or found by night in the possession, without lawful excuse of housebreaking implements; or with his face blackened or disguised, with intent to commit any felony: or found by night in any building, with intent to commit a felony therein:—is guilty of a misdemeanor, punishable with imprisonment (with or without hard labour) not exceeding three years: and, in case of a second conviction, is liable either to such imprisonment, or to penal servitude for not less than three or exceeding ten years (*q*).

(*m*) By 7 & 8 Geo. 4, c. 27. Provisions as to the punishment of burglary, were also made by 7 & 8 Geo. 4, c. 29; but these also are repealed by 7 Will. 4 & 1 Vict. c. 86.

(*n*) 7 Will. 4 & 1 Vict. c. 86, s. 2. As to the form of indictment on this statute, vide R. v. Parfitt, 8. Car. & P. 288.

(*o*) 7 Will. 4 & 1 Vict. c. 86, s. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*p*) By 7 Will. 4 & 1 Vict. c. 86, s. 13, the time at which *the night* shall commence and conclude, in any offence against the provisions of this act, shall be the same as in cases of burglary. Vide sup. p. 175.

(*q*) 14 & 15 Vict. c. 19, ss. 1, 2; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to the construction of 14 & 15 Vict. c. 19, ss. 1, 2, see R. v. Oldham, 21 L. J. (M. C.) 134; R. v. Bailey, 1 Dearsley's C. C. R. 249. By stat. 5 Geo. 4, c. 33, s. 4, it is also

In the second place we proceed to consider the offences in respect of property in general.

I. *Larceny*, or theft (by contraction for latrociny, *latrocinium*), is the unlawful taking and carrying away of things personal, with intent to deprive the right owner of the same (*r*); and it is either simple, or accompanied with circumstances of aggravation (*s*).

The offence of *simple* larceny, or plain theft, [certainly commenced, then, whenever it was, that the bounds of property, or laws of *meum* and *tuum*, were established. How far such an offence can exist in a state of nature, where all things are held to be in common, is a question that may be solved with very little difficulty. The disturbance of any individual in the occupation of what he has seized to his present use, seems to be the only offence of this kind incident to such a state. But unquestionably, in social communities, when property is established, any violation of that property is subject to be punished by the laws of society, though how far that punishment shall extend is matter of considerable doubt.] At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition.

In the first place, it must be an *unlawful taking*, which implies that the goods must pass from the possession of the right owner (*t*), and without his consent (*u*): and therefore where there is no change of possession, or a change of it by consent; or a change from the possession of a person

provided, that persons having in possession house-breaking implements, with intent to break into a house, are to be deemed *rogues and vagabonds*, and punished accordingly.

(*r*) The definition of Blackstone is, "the felonious taking and carrying "away of the personal goods of ano-"ther."—4 Bl. Com. 229. But this leaves it to be inquired what kind of taking and carrying away is considered as felonious.

(*s*) As to *compound*, *mixed* or *complicated* larceny, vide post, p. 192.

(*t*) 1 Hale, P. C. 513.

(*u*) 4 Bl. Com. 230.

without title, to that of the right owner (*v*);—there can, in any of these cases, be no larceny. And, as the taking must be without the consent of the owner, so in general [no delivery of the goods from the owner to the offender, upon trust, can ground a larceny. As if A. lends B. a horse, and he rides away with him.] Yet if the delivery be obtained from the owner by a person having *animus furandi* at the time, and who afterwards unlawfully appropriates the goods in pursuance of that intent, it is larceny: as if, in the case above supposed, B. solicited the loan of the horse, with intent to steal him (*x*). But in such cases, [bare non-delivery shall not of course be intended to arise from a felonious design; since that may happen from a variety of other accidents.] So a person who has received goods by delivery from the owner, will nevertheless be guilty of larceny by appropriating them, if they were delivered under such circumstances as not to divest the owner of the legal possession (*y*); as when a servant embezzles his master's plate (*z*), or the guest at an inn or tavern makes away with the articles of which he has the temporary use (*a*). Also by special provision of the statute 7 & 8 Geo. IV. c. 29, whoever shall steal a chattel or fixture let to be used by him in any house or lodging shall incur the penalties of simple larceny (*b*). And by 20 & 21 Vict. c. 54, it is, among other things, enacted, that any bailee of any property who shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, shall be guilty of larceny,—although he

(*v*) But if a person has temporary title against the permanent owner, the latter may be guilty of larceny in taking them. R. *v.* Wilkinson, R. & R. C. C. 470; 4 Bl. Com. 231.

(*x*) Major Semple's case, 2 Leach, 469, 470. See Queen *v.* Poyser, 20 L. J. (M. C.) 191.

(*y*) Reed's case, 1 Dearsley's C. C. R. 168, 257.

(*z*) Christian's Blackstone, vol. iv. p. 230 (note); 1 Hale, P. C. 506.

(*a*) Hawk. P. C. b. 1, c. 33, s. 6; 4 Bl. Com. 231.

(*b*) 7 & 8 Geo. 4, c. 29, s. 45. There was a former statute on this subject, 3 W. & M. c. 9. It is repealed by 7 & 8 Geo. 4, c. 27.

shall not break bulk or otherwise determine the bailment (c).

Again, [there must not only be a taking, but a *carrying away; cepit et asportavit* was the old law-Latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact: or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs; these have been adjudged sufficient carryings away to constitute a larceny (*d*): or, if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it, this is larceny (*e*)]

Further, this taking and carrying away must be of *personal goods*. [Lands, tenements, and hereditaments, either corporeal or incorporeal,] either freehold or less than freehold, [cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold,—as corn, grass, trees and the like, or lead upon a house,—no larceny could be committed by the rules of the common law; but the severance of them was merely a trespass; which depended on a subtlety, in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immoveable (*f*): and if they were severed by violence, so as to be changed into moveables, and at the same time, by one and the same continued act, carried off by the person who

(c) 20 & 21 Vict. c. 54, s. 4. By sect. 14, upon the trial of any person under this Act, which was passed in order to make "better provision "for the punishment of frauds com- "mitted by trustees, bankers and "other persons entrusted with pro- "perty," (as to which see further, post, p. 202,)—if it shall appear that the offence proved amounts to larceny, he shall not by reason thereof be entitled to be acquitted of a misdemeanor under its provisions.

(*d*) 3 Inst. 108, 109.

(*e*) As to the application of this doctrine, see White's case, 1 Dearsley's C. C. R. 203.

(*f*) Vide sup. vol. II. p. 226.

[severed them; they could never be said to be taken from the *proprietor* in this their newly-acquired state of mobility, (which is essential to the nature of larceny,) being never, as such, in the actual or constructive possession of any one but him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another; since the very act of taking, was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and comes again at *another* time, when they are so turned into personalty, and takes them away, it is larceny] at the common law; [and so it is, if the owner, or any one else, has severed them (*g*).] So, [upon nearly the same principle, the stealing of writings relating to real estate is] at common law, [no felony, but a trespass (*h*); because they concern the land,—or, according to our technical language, *savour of the realty*,—and are considered as part of it by the law: so that they] come to the heir or devisee [together with the land which they concern (*i*). Bonds, bills and notes, (which concern mere *choses in action* (*k*),) were also, at the common law, held not to be such goods whereof larceny might be committed; being of no intrinsic value (*l*), and not importing any property in *possession* of the person from whom they are taken.] By the common law also, [larceny could not be committed of treasure trove, or wreck, till seized by the Crown or him who hath the franchise; for till such seizure, no one hath a determinate property therein:] nor could it be committed, at the common law, [of such animals in which there is no property either absolute or qualified; as of beasts that are *feræ naturæ*, and unreclaimed, such as deer, hares, and conies in a forest, chase, or warren; fish

(*g*) 3 Inst. 109, 1 Hale, P. C. 510.

(*h*) Hale, ubi sup.; R. *v.* Westbeer, Stra. 1137.

(*i*) Vide sup. vol. II. p. 234.

(*k*) See Reg. *v.* Watts, 1 Dearsley's C. C. R. 326.

(*l*) 8 Rep. 33 b.

[in an open river or pond; or wild fowls at their natural liberty (*m*). But if such animals are reclaimed or confined, and may serve for food, it is otherwise; for of deer so inclosed in a park that they may be taken at pleasure, of fish in a trunk, and of pheasants or partridges in a mew, larceny may be committed (*n*).] It is also said (*o*) [that if swans be lawfully marked, it is felony] at common law [to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond; otherwise it is only a trespass. But of all valuable domestic animals, as horses and other beasts of draught; and of all animals *domitæ naturæ*, which serve for food, as neat or other cattle, swine, poultry and the like; and of their fruit or produce taken from them while living, as milk or wool (*p*),—larceny may be committed] at common law; as it may also [of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed (*q*);] while, on the other hand, as [to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value,—as dogs of all sorts, and other creatures kept for whim and pleasure,—though a man may have a bare property therein, and maintain a civil action for the loss of them (*r*); yet they are not of such estimation as that the crime of stealing them amounts to larceny (*s*).]

Lastly, the taking and carrying away must be *with intent to deprive the right owner*; or, as it is frequently expressed, *animo furandi* (*t*). [This requisite, besides excusing

(*m*) 1 Hale, P.C. 511; Fost. 366.

(*n*) Hawk. P. C. b. 1, c. 33, s. 25; 1 Hale. P. C. 511. As to *pigeons*, see Queen *v.* Cheafor, 21 L. J. (M. C.) 43.

(*o*) Dalt. Just. c. 156.

(*p*) Dalt. 21; Crompt. 36; Hawk. P. C. b. 1, c. 33, s. 28; 1 Hale, P. C. 511; The King *v.* Martin, (by all the judges.) P. 17 Geo. 3.

(*q*) 1 Hale, P. C. 511.

(*r*) 1 Hale, P. C. 512. Vide sup. vol. II. p. 7.

(*s*) 1 Hale, P. C. 512. The preceding paragraph, it will be observed, relates only to larceny, or *theft at the common law*. But by modern statutes, the stealing of many things which were at common law not the subject of larceny, is now made penal. Vide post, p. 190.

(*t*) The civil law expresses this by the words "*lucri causa*."—4 Inst. 1. 1.

[those who labour under incapacities of mind or will, of whom we spoke sufficiently at the entrance of this Book (*u*), indemnifies also mere trespassers and other petty offenders. As if a servant takes his master's horse without his knowledge, and brings him home again,—if a neighbour takes another's plough that is left in the field, and uses it upon his own land, and then returns it,—if, under colour of owner of rent where none is due, I distrein another's cattle or seize them,—all these are trespasses, but no felonies (*x*). The ordinary discovery of a felonious intent, is where the party doth it clandestinely; or being charged with the fact, denies it. But this is by no means the only criterion of criminality; for in cases that may amount to larceny, the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent or *animum furandi* (*y*); wherefore they must be left to the due and attentive consideration of the court and jury.]

It is to be observed, that larceny may be committed as to a thing whereof the owner is *unknown* (*z*), provided it appear that there is some person, other than the taker, in whom the ownership resides. [In like manner, as, among the Romans, the *lex Hostilia de furtis* provided that a prosecution for theft might be carried on without the intervention of the owner (*a*).] An example of this may occur in the case of [stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing the corpse itself which has no owner, though a matter of great indecency,] and, if the corpse be disinterred for the purpose, an indictable misde-

(*u*) Vide sup. p. 96.

(*x*) 1 Hale, P. C. 509.

(*y*) To offer to the owner his own property for sale as the goods of another person,—the seller having wrongfully taken the goods,—has been decided to amount to larceny. See Reg. *v.* Hall, 1 Den. C. C. 381; Manning's case, 1 Dearsley's C. C. R. 21.

(*z*) 1 Hale, P. C. 512; 2 Hale, P. C. 290.

(*a*) Gravin. l. 8, c. 106.

meanour (*b*), [is no felony unless some of the grave clothes be stolen with it.]

[Having thus considered the general nature of simple larceny at common law, we now arrive at its punishment. Theft, by the Jewish law, was only punished with a pecuniary fine and satisfaction to the party injured (*c*). And in the civil law till some very late constitutions, we never find the punishment capital. The laws of Draco, at Athens, punished it with death: but his laws were said to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct. And so the Attic laws in general continued (*d*), except that once, in a time of dearth, it was made capital to break into a garden and steal figs; but this law, and the informers against the offence, grew so odious, that from them all malicious informers were styled *sycophants*, a name which we have much perverted from its original meaning.] In this country, [our antient Saxon laws nominally punished theft with death, if above the value of twelve pence; but the criminal was permitted to redeem his life by a pecuniary ransom; as, amongst their ancestors the Germans, by a stated number of cattle (*e*). But in the ninth year of Henry the first, this power of redemption was taken away;] and all persons guilty of larceny above the value of twelve pence, were directed to be hung (*f*). So that stealing to above this value, (which was called *grand larceny*,) became a felony absolutely capital, and

(*b*) Vide post, c. XII. Blackstone remarks (vol. iv. p. 235), that by the law of the Franks, a person who dug a corpse up, in order to strip it, was to be banished from society; and no one suffered to relieve his wants till the relatives of the deceased consented to his readmission; and he cites Montesq. Sp. L. b. 30, c. 19.

(*c*) Exod. xxii.

(*d*) Petit. LL. Attic. l. 7, tit. 5.

(*e*) Tac. de Mor. Germ. c. 12.

(*f*) This sum (says Blackstone, vol. iv. p. 237) was the standard in the time of King Athelstan; and he observes that afterwards, in the reign of King Henry the first, one shilling was the stated value, at the Exchequer, of a pasture fed ox (Dial. de Scacc. l. 1, s. 7); and that if we should suppose this shilling to mean that *solidus legalis* mentioned by Lyndewoode, (Prov. l. 3, c. 13), or the 72nd part of a pound of gold, it would be equal to 13*s*. 4*d*. of the present standard.

so continued to our own times (*g*): while *petit* larceny, that is, theft to inferior amount, (though also described as felony,) was punished with imprisonment or whipping only (*h*). However, by the law relating to *benefit of clergy* (*i*), as latterly modified, persons who committed simple larceny only, though to the amount of more than twelve pence, (or indeed to any amount whatever,) were in fact excused the pains of death, provided it were the first offence; and provided the benefit of clergy had not been taken away from the particular species of theft by some express statute, as was very frequently the case (*j*): and, when the capital punishment was thus taken away, were formerly liable to be burnt in the hand or whipped, or, in more modern times, to be whipped, or transported for seven years: which latter punishment might also latterly be inflicted, (in lieu of the common law penalties,) on persons convicted of petit larceny (*k*). And such was the state of the law on this subject as late as the year 1827; when, by stat. 7 & 8 Geo. IV. c. 29, ss. 3, 4, it was provided, that every person, convicted of simple larceny of any amount, (all distinctions between grand and petit larceny being by the same statute abolished,) should be liable to be transported for seven years, or imprisoned for not more than two years (*l*). But

(*g*) The progressive reduction in the value of money, while death continued to be the sentence for theft to the same amount as before justified the complaint of Sir H. Spelman (Gloss. 350), that while everything else living became dearer, the life of man had continually grown cheaper.

(*h*) 3 Inst. 218; Hawk. b. 1, c. 33, s. 36; 4 Bl. Com. 237. These denominations of grand and petit larceny are now at an end by 7 & 8 Geo. 4, c. 29, s. 2; which gives to thefts to the amount of twelve pence and under, the same effect as to thefts of greater amount.

(*i*) Vide post, c. XXIII.

(*j*) 4 Bl. Com. 237.

(*k*) 4 Geo. 1, c. 11; 19 Geo. 3, c. 74; 4 Bl. Com. 236, 237.

(*l*) In certain cases, however, the offence of simple larceny committed by juvenile offenders, or to a small amount in pecuniary value, or where the person charged pleads guilty (and also *attempts* to commit simple larceny,) may be disposed of in a summary way before justices at petty sessions, (or before a metropolitan or other stipendiary magistrate sitting alone,) and punished in a lighter

this was afterwards altered by 12 & 13 Vict. c. 11, which, (except in such cases as therein referred to,) took away the punishment of transportation for persons convicted of simple larceny: and according to the provisions now in force, the punishment of this offence is, in ordinary cases, imprisonment with hard labour (with or without solitary confinement) for not more than two years, and (if the offender be a male) whipping at the discretion of the court (*m*); in case of having been before twice convicted of any of the offences punishable upon summary conviction under 7 & 8 Geo. IV. cc. 29, 30, or 10 & 11 Vict. c. 82, penal servitude for not more than seven or less than three years (*n*);—and in case of a conviction after a previous conviction for felony, penal servitude for not less than four years or more than ten years (*o*). In certain cases, moreover, where the larceny relates to a subject for which the policy of the law provides with more anxiety, the punishment is even more severe. For if any person shall steal, (to the value of ten shillings,) goods or articles of silk, woollen, linen or cotton; or of one or more of these materials mixed with each other, or mixed with any other material;—whilst laid, placed, or exposed, during any stage, process or progress of manufacture, in any building, field or other place,—he is liable to penal servitude for a term not exceeding fifteen years nor less than ten years; or to be imprisoned for a term not exceeding three years; with hard labour and solitary confinement, if the court think fit, during such imprisonment (*p*). And if any person shall steal any horse, mare, gelding, colt, or

way than on indictment. Vide post, chapter on Summary Convictions.

(*m*) 7 & 8 Geo 4, c. 29, ss. 3, 4.

(*n*) Ibid.; 12 & 13 Vict. c. 11, s. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*o*) 16 & 17 Vict. c. 99, s. 12.

(*p*) 7 & 8 Geo. 4, c. 29, s. 16; 7 Will. 4 & 1 Vict. c. 90; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to the former state of the law with respect to stealing woollen cloth, linens, fustians, calicoes or cotton goods from the place of manufacture, see 22 Car. 2, c. 5; 15 Geo. 2, c. 27; 18 Geo. 2, c. 27; 51 Geo. 3, c. 41; 4 Geo. 4, c. 53.

filly; or any bull, cow, ox, heifer or calf; or any ram, ewe, sheep or lamb; or shall wilfully kill any of such cattle, with intent to steal the carcase or skin or any part of the cattle so killed; he shall be guilty of felony: and he is liable to the same punishments as last above particularized (*p*).

The additional severity in these instances, is owing to the difficulty there would otherwise be in preserving goods so easily carried off. [Upon which principle the Roman law punished more severely than other thieves the *abigei*, or stealers of cattle (*q*); and the *balnearii*, or such as stole the clothes of persons who were washing in the public baths (*r*): both which constitutions seem to be borrowed from the laws of Athens (*s*). And so, too, the antient Goths punished with unrelenting severity, thefts of cattle or corn that was reaped and left on the field; such kind of property, which no human industry can sufficiently guard, being esteemed under the peculiar custody of Heaven (*t*).]

The offence which we have been hitherto considering is simple larceny as it existed at common law; but in connection with this offence, and proper for consideration under the same head, is the crime of *simple stealing* (or *theft*) *of things not the subject of larceny at common law*. For in progress of time, it was found necessary to extend the protection of the penal laws to many of those subjects, of which the antient law of larceny took no account: and acts of parliament were accordingly passed, from time to time, by which punishments were imposed for thefts committed in respect of various kinds of property so circumstanced: and though these statutes have been since re-

(*p*) 7 & 8 Geo. 4, c. 29, s. 25; 7 Will. 4 & 1 Vict. c. 90; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*q*) Ff. 47, t. 14.

(*r*) Ib. t. 17.

(*s*) Pott. Antiq. b. 1, c. 26.

(*t*) Stiern. de Jure Goth. l. 3, c. 5.

pealed, the same general object has been pursued in the 7 & 8 Geo. IV. c. 29, passed "For consolidating and "amending the Laws in England relative to Larceny, and "other Offences connected therewith." By this Act, provisions are made against stealing "valuable securities,"—such as bonds, bills and the like (*u*)—and many other subjects of property, of which the enumeration will be found in a note below (*v*); so that it may be laid down in general terms, that stealing has now become an offence, liable to punishment or penalty, in regard to all moveables whatever. We may also remark, with respect to the kinds of stealing thus created by statute in supplement to the antient law of larceny, that all the common law doctrines relative to larceny which we have already had occasion to notice, are in general applicable to thefts of this description also (*x*), (though they are not technically denominated larcenies (*y*)); and that their punishment is, in many cases, identical. In many instances, however, they do not amount, like larceny at common law, to a felony; but to a misdemeanor only, and are visited with some lighter degree of punishment: and there are several kinds of them not assignable to the class either of felony or misde-

(*u*) 7 & 8 Geo. 4, c. 29, s. 5. See R. *v.* Smith, 1 Dearsley's C. C. R. 561.

(*v*) See 7 & 8 Geo. 4, c. 29, s 21, as to stealing records and judicial documents;—s. 22, as to stealing or destroying wills;—s. 23, as to stealing documents of title;—s 26, deer;—s. 30, hares or conies;—s. 31, beasts or birds;—s. 33, pigeons;—s. 34, fish (see Hughes *v.* Buckland, 15 Mee. & W. 346);—s. 36, oysters;—s. 37, ores in mines, &c.;—ss. 38, 39, trees or shrubs, &c. (see Tarry *v.* Newman, 15 Mee. & W. 645);—s. 40, fences, stiles, gates, &c.;—s. 42, plants, fruits, &c.;—s. 44, fixtures in houses, squares, or street fences;—7 Will. 4 & 1 Vict. c. 87, s. 8; 9 & 10 Vict. c. 89, as to plundering wrecks;—8 & 9 Vict. c. 47, as to stealing dogs, with respect to which, (and to the stealing of other beasts and birds,) see a more particular account, sup. vol. II. p. 8. A variety of antecedent statutes that had been passed with the same object of supplying the defects of the antient law in this particular, and that are noticed by Blackstone, (vol. iv. p. 233, &c.,) are now repealed by 7 & 8 Geo. 4, c. 27.

(*x*) R. *v.* St. John, 7 C. & P. 324.

(*y*) See R. *v.* Gooch, 8 C. & P. 293.

meanor; but restrained by fixed pecuniary penalties only, recoverable, in a summary way, before a justice of the peace (*z*).

We have seen that larceny may not only be simple, but combined with circumstances of aggravation; which is described in our books as mixed, compound, or complicated larceny (*a*): and this is not only, like simple larceny, felonious, but is felony of a more penal character. We will therefore now consider,

1. *Larceny from a dwelling-house, shop, warehouse, or counting-house.* Larceny from the house, [though it seems to have a higher degree of guilt than simple larceny, yet was not at all distinguished from the other at common law (*b*): unless where it was accompanied with the circumstance of breaking the house by night, and then it fell under another description, viz., that of burglary.] But afterwards, by several acts of parliament,—[the history of which is very ingeniously deduced by a learned modern writer (*c*), who hath shown them to have gradually arisen from our improvements in trade and opulence,]—the benefit of clergy was taken from larcenies committed in a house in almost every instance; as also from those committed in shops, warehouses, coach-houses or stables; so that the capital sentence, to which they were subject as larcenies, took effect. These Acts, however, are all now repealed, and this crime is now regulated by 7 & 8 Geo. IV. c. 29, and 7 Will. IV. & 1 Vict. c. 86. By the first of these Acts, if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security to any value whatsoever (*d*); or shall break and enter any building, and steal therein any chattel, money, or valuable security, such building being within the

(*z*) Vide post, chapter on Summary Convictions.

(*a*) 4 Bl. Com. 239; Hawk. P. C. b. 1, cc. 33, 34. Vide sup. p. 181.

(*b*) Hawk. P. C. b. 1, c. 36.

(*c*) Barrington on Statutes, 375, &c.

(*d*) Sect. 12.

curtilage of a dwelling-house, and occupied therewith, but not being part thereof according to the provisions of the first-mentioned Act (*e*); or shall break and enter any shop (*f*), warehouse, or counting-house (*g*), and steal therein any chattel, money, or valuable security;—the offender, in any of such cases, shall be deemed guilty of felony: and he is punishable by penal servitude for a term not exceeding fifteen years nor less than ten, or he may be imprisoned for a term not exceeding three years; to which imprisonment, hard labour and solitary confinement may be superadded if the court think fit (*h*). And it is further enacted by 7 & 8 Geo. IV. c. 29, s. 12, and 7 Will. IV. & 1 Vict. c. 86, s. 5, that whoever shall steal in any dwelling-house any chattel, money, or valuable security to the value in the whole of five pounds or more; or shall steal any property in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear;—shall be guilty of felony: and he is liable to the same punishments as last above particularized (*i*).

2. Larceny *from a church*, or (as it is sometimes called) *sacrilege*. By statute 23 Henry VIII. c. 1, and 1 Edw. VI. c. 12, it was felony, without benefit of clergy, to commit larceny, above the value of twelve pence, in a church or chapel (*k*). But these statutes are now repealed; and by the enactments now in force, if any per-

(*e*) 7 & 8 Geo. 4, c. 29, s. 13. Vide sup. p. 176.

(*f*) To fall under this description, the place must be a shop for the sale of goods, and not a mere workshop. R. *v.* Saunders, 9 C. & P. 79.

(*g*) As to what is a counting-house within the meaning of this provision, see Queen *v.* Potter, 20 L. J. (M. C.) 170.

(*h*) 7 & 8 Geo. 4, c. 29; 7 Will. 4 & 1 Vict. c. 90; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*i*) The former state of the law as to larceny from a house, shop, &c., was very complicated. It depended on statutes 5 & 6 Edw. 6, c. 9; 39 Eliz. c 15; 3 & 4 W. & M. c. 9; 10 & 11 Will. 3, c. 23: all which are now repealed by 7 & 8 Geo. 4, c. 27. By these statutes the amount of the property stolen,—as being above twelve pence, or of the value of five shillings, or forty shillings,—constituted in the several cases respectively, a material ingredient in the offence.

(*k*) 1 Hale, P. C. 518.

son shall break and enter any church or chapel (*l*), and shall steal therein any chattel; or, having stolen any chattel in any church or chapel, shall break out of the same; —he shall be sentenced to penal servitude for life, or not less than three years; or be imprisoned for not more than three years, with hard labour and solitary confinement, at the discretion of the court or judge, during the period of imprisonment (*m*).

3. [Larceny *from the person* (*n*): which is either by *privately stealing*; or by open and violent assault, usually called *robbery*. The offence of *privately stealing from a man's person*,—as by picking his pocket or the like, privily without his knowledge,—was debarred of the benefit of clergy so early as by the statute 8 Eliz. c. 4 (*o*):] a severity which [seems to be owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practised (even in the Queen's court and presence) at the time when this statute was made; besides, that this was an infringement of property in the manual occupation or corporal possession of the owner; which was an offence even in a state of nature: and, therefore, the *saccularii*, or cut-purses, were more severely punished than common thieves by

(*l*) As to what buildings come under this provision, see R. *v.* Wheeler, 3 Car. & P. 585; R. *v.* Richardson, 6 Car. & P. 335; R. *v.* Nixon, 7 C. & P. 442; R. *v.* Evans, 1 Car. & M. 298.

(*m*) 7 & 8 Geo. 4, c. 29, s. 10; 5 & 6 Will. 4, c. 81; 6 & 7 Will. 4, c. 9; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*n*) In certain cases, larceny from the person committed by juvenile offenders, or to a trifling amount, or where the person charged pleads guilty, and also *attempts* to commit larceny upon the person,) may be disposed of summarily by justices at petty sessions, (or before a metropolitan or other stipendiary magistrate sitting alone,) and punished in a lighter way than on indictment. Vide post, chapter on Summary Convictions.

(*o*) This, it will be observed, applies only to the case where the thing stolen was of the value of more than twelve pence; for if it was below that value, so as to reduce the offence to petit larceny (as to which vide sup. p. 188), there was no need of the benefit of clergy,—the sentence not being capital. Hawk. P. C. b. 1, c. 35, s. 4.

[the Roman and Athenian laws (*p*).] But this statute of Elizabeth is now repealed by 7 & 8 Geo. IV. c. 27; and new provisions are now in force as to the punishment of this offence, of which we shall presently have occasion to speak more at large.

[Open and violent larceny from the person, or robbery, the *rapine* of the civilians, is the] unlawful and [forcible taking from the person of another, of goods or money to any value, by violence or putting him in fear (*q*). 1. There must be] an unlawful [taking, otherwise it is no robbery (*r*).] On the other hand, [if the thief, having once taken a purse, returns it, still it is a robbery (*s*); and so it is, whether the taking be strictly from the person of another, or in his presence only; as where a robber, by menaces and violence, puts a man in fear, and drives away his sheep or his cattle before his face (*t*). But if the taking be not either directly from his person or in his presence, it is no robbery (*u*). 2. It is immaterial of what value the thing is: a penny as well as a pound, thus forcibly extorted, makes a robbery (*v*). 3. Lastly, the taking must be by force, or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law (*w*), *qui vi rapuit, fur improbior esse videtur.* This previous violence or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if one privately steals] a chattel [from the person of another, and afterwards keeps it by putting him in fear, this is no rob-

(*p*) Ff. 17, 11, 7; Pott. Antiq. 1. 1, c. 26.

(*q*) Hawk. P. C. b. 1, c. 34, s. 2.

(*r*) A mere attempt to rob was held to be felony so late as Henry the fourth's time; (1 Hale, P. C. 532;) but afterwards it was taken to be only a misdemeanor until 7 Geo. 2, c. 21; which made it a felony. This statute was repealed by 4 Geo. 4, c. 54, which is itself repealed by 7 & 8 Geo. 4, c. 27. And as to the present law, vide 7 Will. 4 & 1 Vict. c. 87, post, p. 197.

(*s*) R. *v.* Peat, 1 Leach, C. C. 228.

(*t*) 1 Hale, P. C. 533.

(*u*) Comyns, 478; R. *v.* Francis, Str. 1015.

(*v*) Hawk. P. C. b. 1, c. 34, s. 16.

(*w*) Ff. 47, 2, 4, xxii.

[bery, for the fear is subsequent (*x*). Not that it is indeed necessary to lay in the indictment that the robbery was committed by *putting in fear:* it is sufficient if laid to be done by *violence* (*y*). And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much force or threatening, by word or gesture, be used as might create an apprehension of danger; or induce a man to part with his property without or against his consent (*z*). Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, yet this is undoubtedly a robbery.] Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence; this also falls within the definition of the same crime (*a*). [So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubtful whether the forcing a higgler or other chapman to sell his wares, and giving him the full value for them, amounts to so heinous a crime as robbery (*b*). This species of larceny was debarred of the benefit of clergy by stat. 23 Hen. VIII. c. 1, and other subsequent statutes; not indeed in general, but only when committed in a dwelling-house, or in or near the king's highway. A robbery, therefore, in a distant field, was not punished with death (*c*); but was open to the benefit of clergy till the statute 3 & 4 W. & M. c. 9; which took away clergy from both principals and accessories before the fact, in robbery, wheresoever committed.]

But all these statutes,—as well as the 8 Eliz. c. 4, with respect to privately stealing from the person,—were repealed by 7 & 8 Geo. IV. c. 27. And, by other enactments, new

(*x*) 1 Hale, P. C. 534.

(*y*) Trin. T. 3 Ann. so held by all the judges.

(*z*) Fost. 128.

(*a*) Hawk. P. C. b. 1, c. 34, s. 8.

(*b*) Ibid s. 14.

(*c*) 1 Hale, P. C. 535.

provisions are now made against both species of offences; with distinctions, as regards robbery, suitable to the aggravations with which that crime may have been committed. According to these, whosoever shall *rob any person, and at the time, or immediately before or immediately after such robbery, shall stab, cut or wound any person*, shall suffer death (*d*): whoever, *being armed with any offensive weapon or instrument, shall rob, or assault with intent to rob, any person*, or shall, *together with one or more person or persons, rob, or assault with intent to rob, any person*, or shall *rob any person, and at the time of, or immediately before, or immediately after such robbery, shall beat, strike or use any other personal violence to any person*,—shall be guilty of felony, and may be sentenced to penal servitude for life, or not less than fifteen years; or imprisoned (with or without hard labour and solitary confinement) for not more than three years (*e*): whoever shall *accuse or threaten to accuse of such abominable crime as in the* 7 *Will. IV.* & 1 *Vict.* c. 87 *specified, or of any attempt or solicitation thereto, and shall extort property by such intimidation*, shall incur the like penalty (*f*): whoever shall *rob* any person, or *steal any property from the person* of another, shall be kept in penal servitude for a term not exceeding fifteen years nor less than ten, or be imprisoned for not more than three (*g*): whoever shall *assault any person with intent to rob*, shall be guilty of felony, and be imprisoned for not more than three years (*h*): and whoever, *with menaces or force, shall demand any property of any person, with intent to steal the same*, shall incur the like penalty (*i*). Together with

(*d*) 7 Will. 4 & 1 Vict. c. 87, s. 2.

(*e*) Ibid. s. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*f*) 7 Will. 4 & 1 Vict. c. 87, s. 4; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*g*) 7 Will. 4 & 1 Vict. c. 87, s. 5; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*h*) 7 Will. 4 & 1 Vict. c. 87, s. 6. (As to this offence, see R. *v.* Huxley, 1 Car. & M. 596.)

(*i*) 7 Will. 4 & 1 Vict. c. 87, s. 7. And see 6 & 7 Vict. c. 96, s. 3, as to *threatening to publish*, or *offering to abstain from publishing, a libel*, with intent to extort money, &c., *post*, p. 323.

which provisions, should be noticed that of 14 & 15 Vict. c. 100, s. 11, that if upon the trial of an indictment for robbery it shall appear to the jury that the defendant did not commit the crime, but that he was guilty of an *assault with intent to rob*, they may return a verdict accordingly; and the defendant shall be liable to the same punishment as if he had been convicted upon an indictment for such assault (*j*).

In connection with the offence comprised in the statute of 7 Will. IV. & 1 Vict. c. 87, of extorting money by threat, we may notice the provision of the prior act of 7 & 8 Geo. IV. c. 29, s. 8,—by which it is enacted, that if any person shall knowingly send or deliver any letter or writing, demanding of any person with menaces, and without reasonable or probable cause, any chattel, money, or valuable security; such offender shall be guilty of felony (*k*): and he is punishable with penal servitude for life, or not less than three years; or with imprisonment (with or without hard labour and solitary confinement) for not more than four years; and if a male he may be once, twice, or thrice whipped, if the court think fit, in addition to the imprisonment (*l*). Also it has been recently enacted by 10 & 11 Vict. c. 66, that if any person shall knowingly send or deliver or utter to any other person any letter or writing, accusing or threatening to accuse either the person to whom such letter or writing shall be sent or delivered, or any other person, of any crime punishable by law by death or penal servitude (*m*); or of any assault with intent to commit, or of attempt or endeavour to commit, any rape or infamous crime;—with a view or intent to extort or gain

(*j*) See R. *v.* Mitchell and others, 21 L. J. (M. C.) 135. Prior to this Act he would have been entitled to an acquittal, because not convicted of the felony charged.

(*k*) As to what is a threatening letter under this statute, vide R. *v.* Pickford, 4 Car. & P. 227. Et vide post, c. x., as to letters threatening to kill, burn, &c., 4 Geo. 4, c. 54, s. 3.

(*l*) 7 & 8 Geo. 4, c. 29, s. 8; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*m*) The word in the Act is *transportation*; but see 20 & 21 Vict. c. 3, s. 6.

thereby any property, money, security or valuable thing from any person whatever; or shall accuse or threaten to accuse any person of any of the above crimes with a like intent;—he shall be guilty of felony: and he is liable to the same punishments as last particularized (*n*).

4. Larceny *by clerks, servants, agents, bailees, &c.* Special provision against larcenies by servants, was made by the statutes 33 Hen. VI. c. 1, and 21 Hen. VIII. c. 7; both which were repealed by 7 & 8 Geo. IV. c. 27. But by other enactments now in force, it is provided, that if any clerk or servant shall steal any chattel, money, or valuable security, belonging to or in the possession or power of his master, he shall be sentenced to penal servitude for a term not exceeding fourteen years, nor less than three years; or may be imprisoned (with or without hard labour or solitary confinement) for a term not exceeding three years; and if a male, once, twice, or thrice whipped, if the court think fit, in addition to the imprisonment (*o*). In addition to which, there are separate provisions against *embezzlement;* a crime distinguished from larceny, properly so called, as being committed in respect of property which is not, at the time, in the actual or legal possession of the owner (*p*). As to this it is enacted, that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security for or in the name or on the account of his master, and shall fraudulently embezzle the same, or any part thereof,—every such offender shall be deemed to

(*n*) 10 & 11 Vict. c. 66; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*o*) 7 & 8 Geo. 4, c. 29, s. 46; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to who is a servant within the meaning of 7 & 8 Geo. 4, c. 29, s. 46, vide R. *v.* Haydon, 7 Car. & P. 445. As to larceny by a clerk in a public office, see R. *v.* Lovell, 2 M. & Rob. 236.

(*p*) See R. *v.* Gill, 1 Dearsley's C. C. R. 289. As to the *indictment* for this offence, and the provision of 14 & 15 Vict. c. 100, s. 13, relative thereto, vide post, c. XVIII. See also 20 & 21 Vict. c. 54, s. 4, cited post, p. 202.

have feloniously stolen the same; and shall suffer the same punishment as last above particularized (*q*): and that if any money, or security for the payment of money, shall be entrusted to any banker, merchant, broker, attorney or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds, or any part of the proceeds, of such security, for any purpose specified in such direction—and he shall, in violation of good faith and contrary to the purpose so specified, in any wise convert to his own use or benefit such money, security or proceeds, or any part thereof—every such offender shall be guilty of a misdemeanor; and he may be sentenced to penal servitude for a term not exceeding fourteen years, or less than three years, or to such other punishment by fine or imprisonment, or both, as the court shall award (*r*). Again, if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund of this country or any foreign state, or in any fund of any body corporate, company or society,—shall be entrusted to any banker, merchant, broker, attorney or other agent, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge;—and he shall, in violation of good faith, and contrary to the object of the trust, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof;—every such offender shall incur the same penalties as are imposed in the case last before mentioned (*s*). It is provided (*t*), however, that this last-mentioned enactment shall not affect any trustee in or under any instrument whatever, or any mortgagee of any property,.

(*q*) 7 & 8 Geo. 4, c. 29, s. 17; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*r*) 7 & 8 Geo. 4, c. 29, s. 49; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*s*) Ibid. See R. *v.* Nettleton, R. & M. C. C. R. 259.

(*t*) 7 & 8 Geo. 4, c. 29, s. 50.

(real or personal,) in respect of any act done by such trustee or mortgagee in relation to the property comprised in, or affected by, any such trust or mortgage: nor shall it restrain any banker, merchant, broker, attorney or other agent, from receiving any money which shall be or become actually due and payable upon any valuable security, according to the tenor and effect thereof, in such manner as he might otherwise have done; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling him by law so to do,—unless such sale, transfer, or other disposal, shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim or demand. It is moreover enacted, that if any factor or agent entrusted, for the purpose of sale, with any goods or merchandize, or entrusted with any bill of lading, warehouse keeper's or wharfinger's certificate or warrant, or order for delivery of goods or merchandize,—shall for his own benefit, and in violation of good faith, deposit or pledge any such goods or merchandize, or any of the said documents, as a security for any money or any negotiable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received,—he shall incur the same penalties as in the two former cases (*u*); but that no such factor or agent shall be liable to prosecution for depositing or pledging any such goods or merchandize, or any of the aforesaid documents, in case the same shall not be made a security for, or subject to the payment of, any greater sum of money than the amount which, at the time of such deposit or pledge, was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange drawn by or on account of such principal, and acceptor by such factor or agent (*v*).

In addition to which provisions, it has been now recently

(*u*) 7 & 8 Geo. 4, c. 29, s. 51. (*v*) Ibid.

provided by 20 & 21 Vict. c. 54, that any person who, being a bailee of any property, shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny (*w*); and that any person offending in any of the cases following, shall be guilty of a misdemeanor:— 1. Any person, who, being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, (with intent to defraud,) convert, or appropriate the same, or any part thereof, to or for his own use or purposes; or shall, with intent as aforesaid, otherwise dispose of or destroy such property, or any part thereof (*x*). 2. Any person, who, being a banker, merchant, broker, attorney or agent, and being intrusted for safe custody with the property of any other persons, shall, with a similar intent, sell, negotiate, transfer, pledge, or in any manner convert or appropriate to or for his own use, such property or any part thereof (*y*). 3. Any person, who, being entrusted with any power of attorney for the sale or transfer of any property, shall fraudulently

(*w*) 20 & 21 Vict. c. 54, s. 4. (As to the punishment of larceny, vide sup. p. 189.) If on the trial of any person, under this Act, it appears that the offence proved amounts to larceny, he is not thereby entitled to be acquitted of a misdemeanor (sect. 14).

(*x*) 20 & 21 Vict. c. 54, s. 1. A trustee is, for the purposes of this Act, a trustee on some express trust created by some deed, will, or instrument in writing; and the term is also to include the heir and personal representative of any such trustee, and also all executors and administrators, liquidators under the Joint-Stock Companies Act, 1856, and all assignees in bankruptcy and insolvency (sect. 17). It is to be noticed that a prosecution for an offence included in the first section, but in no other, of this Act, can only be undertaken by the sanction of the attorney-general, or (in case that office be vacant) of the solicitor-general; and that "where any "civil proceeding shall have been "taken against any person to whom "the provisions of the first section, "but not of any other section of "this Act, may apply, no person "who shall have taken such civil "proceeding shall commence any "prosecution under this Act without the sanction of the court or "judge before whom such civil proceeding shall have been heard, or "is pending" (sect. 13).

(*y*) 20 & 21 Vict. c. 54, s. 2.

sell or transfer or otherwise convert such property, or any part thereof, to his own use or benefit (*z*). 4. Any person, who, being a director, member or public officer of any body corporate or public company, shall fraudulently take or apply for his own use any of the money or other property of such body corporate or public company (*a*). 5. Any person, who being a director, public officer, or manager of such body or company, shall, as such, receive or possess himself of any of the money or other property of such body or company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make, or to cause or direct to be made, a full and true entry thereof in the books and accounts (*b*): or shall make, circulate or publish, or concur in making, circulating or publishing, any written statement or account, which he shall know to be false in any material particular; with intent to deceive any member, shareholder or creditor of such body or company; or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any money or property to such body or company, or to enter into any security for the benefit thereof (*c*). 6. Any person, who being a director, manager, public officer, or member of any such body or company, shall, with intent to defraud, destroy, alter, mutilate or falsify any of the books, papers, writings or securities belonging to the body or company; or make or concur in the making of any false entry, or any material omission, in any book of account or other document (*d*). The punishment for a misdemeanor under this Act is, at the discretion of the court, penal servitude for three years; or such other punishment by imprisonment for not more than two years, with or without hard labour, or by fine, as the court shall award (*e*). And there is a provision that no proceeding, conviction or judgment thereunder shall prevent, lessen or im-

(*z*) 20 & 21 Vict. c. 54, s. 3.

(*a*) Sect. 5.

(*b*) Sect. 6.

(*c*) Sect. 8.

(*d*) Sect. 7.

(*e*) Sect. 10. No misdemeanor, under this Act, can be tried at sessions (sect. 16).

pede any remedy at law or in equity which any person aggrieved by any offence against the Act, might otherwise have had (*f*); or affect or prejudice any agreement or security given by any trustee, having for its object the restoration or repayment of any trust-money misappropriated (*g*).

5. Larcenies *in relation to the Post office.* By 7 Will. IV. & 1 Vict. c. 36, s. 25, every person employed under the Post office, who shall, contrary to his duty, open or procure or suffer to be opened, or wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall be guilty of a misdemeanor; and punished by fine or imprisonment, or both, as to the court shall seem meet. By other provisions, every person so employed, who shall steal, or for any purpose embezzle, secrete or destroy a post letter, shall be guilty of felony, punishable with penal servitude for not more than seven or less than three years, or with imprisonment for not more than three years (*h*): and if the letter contain any chattel, money, or valuable security, then with penal servitude for life, or any term not less than three years; or with imprisonment, (with or without hard labour,) for any term not exceeding four years (*i*). Again, every person so employed, who shall steal, or for any purpose embezzle, secrete or destroy, or wilfully detain or delay in the course of conveyance or delivery by post, any printed votes, or proceedings in parliament, or any printed newspaper, or other printed paper sent by the post without covers, or in cover open at the sides,—shall be guilty of a misdemeanor punishable by fine or imprisonment, or both, as to the court shall seem meet (*j*). These provisions relate only to offences by persons employed in the department of

(*f*) But no conviction under the Act, shall be received in evidence against the offender, at law or in equity (20 & 21 Vict. c. 54, s. 12).

(*g*) 20 & 21 Vict. c. 54, s. 12.

(*h*) 7 Will. 4 & 1 Vict. c. 36, s. 26; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*i*) 7 Will. 4 & 1 Vict. c. 36, ss. 25, 41, 42; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to this provision, see R. *v.* Rathbone, 1 Car. & M. 220; R. *v.* Mence, ib. 234; R. *v.* Young, 2 Car. & K. 466; R. *v.* Glasse, 2 Cox's Cr. C. 236; R. *v.* Reason, 1 Dearsley's C. C. R. 226; R. *v.* Shepherd, ibid. 606.

(*j*) 7 Will. 4 & 1 Vict. c. 26.

the Post office: but by other enactments, *every* person who shall steal out of a post letter any chattel or money or valuable security; or shall steal a post letter-bag; or a post letter from a post letter-bag, or from a post office or officer of the post, or a mail; or shall stop a mail with intent to rob or search the same;—shall be guilty of felony; and he may be sentenced to penal servitude for life, or any term not less than three years; or imprisonment (with or without hard labour) not exceeding four years (*k*). And every person who shall steal or unlawfully take away a post letter-bag sent by a post office packet, or a letter out of any such bag; or shall unlawfully open any such bag,—shall be guilty of felony; and he may be sentenced to penal servitude for a term not exceeding fourteen years, or less than three years; or imprisonment (with or without hard labour) for three years (*l*). And every receiver of a post letter, post letter-bag, chattel, money or valuable security feloniously stolen under the Post office Acts, knowing the same to have been so stolen, shall be guilty of felony; and he may be sentenced to penal servitude for life, or not less than three years, or imprisonment (with or without hard labour and solitary confinement) for not more than four years (*m*). And every person who shall fraudulently retain, or wilfully secrete, or keep, or detain, or, being required by an officer of the Post office, neglect or refuse to deliver up a post letter, which ought to have been delivered to any other person; or shall neglect or refuse to deliver up a post letter-bag, or post letter which shall have been sent and lost;—shall be guilty of a misdemeanor, punishable with fine and imprisonment (*n*).

(*k*) 7 Will. 4 & 1 Vict. c. 36, ss. 27, 28, 41, 42; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to this offence, see R. *v.* Harley, 1 Car. & Kir. 89. Stealing letters sent by the post was felony without benefit of clergy, by 7 Geo. 3, c. 50, repealed by 7 Will. 4 & 1 Vict. c. 32.

(*l*) 7 Will. 4 & 1 Vict. c. 36, ss. 29, 41, 42; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. See R. *v.* Jones, 2 Car. & K. 236.

(*m*) 7 Will. 4 & 1 Vict. c. 36, ss. 30, 41, 42; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*n*) 7 Will 4 & 1 Vict. c. 36, s.

6. Larcenies *from ships* (*m*), *docks, wharfs, or quays.* Any person stealing any goods (*n*) or merchandize in any vessel, barge or boat in any port of entry or discharge, or upon any navigable river or canal (*o*), or in any creek belonging to or communicating with any such port, river or canal; or stealing any goods or merchandize from any dock, wharf, or quay adjacent to any such port, river, canal or creek;—is liable to penal servitude for not more than fifteen years or less than ten years, or may be imprisoned for not more than three years, with hard labour (if the court think fit) and solitary confinement (*p*).

Having now considered the several kinds of larcenies, whether simple or with aggravation, we must refer, under the same head, to that offence so closely connected with larceny itself, of *receiving stolen property knowing the same to have been stolen* (*q*). This offence was, at common law, a misdemeanor only; but was afterwards made felony by several statutes now repealed (*r*). By those now in force, however, it is provided, that if any person shall knowingly

31. By 11 & 12 Vict. c. 88, s. 4, every officer of the Post office who shall grant or issue any *money order* with a fraudulent intent, shall be guilty of felony: he is liable, at the discretion of the court, to penal servitude for not more than seven or less than three years, or imprisonment for any term not exceeding three years. (11 & 12 Vict. c. 88, s. 4; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.) See also 11 & 12 Vict. c. 88, s. 5, providing that in all indictments for offences against the Post office it shall be sufficient to allege an intent to defraud "Her Majesty's Postmaster-General," &c.

(*m*) As to plundering *wrecks*, vide sup. vol. II. p. 547.

(*n*) The luggage of a passenger by steam-boat comes under the description of "goods" within this provision. R. *v.* Wright, 7 Car. & P. 159.

(*o*) Theft on navigable rivers to the value of 10*s.* was felony without benefit of clergy by 24 Geo. 2, c. 45, now repealed by 7 & 8 Geo. 4, c. 27.

(*p*) 7 & 8 Geo. 4, c. 29, s. 17; 7 Will. 4 & 1 Vict. c. 90; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to the *indictment* for larceny, and the provisions of 14 & 15 Vict. c. 100, ss. 16, 17, 18, relative thereto, vide post, c. XVIII.

(*q*) As to the *indictment* for this offence, and the provisions of 11 & 12 Vict. c. 46, and 14 & 15 Vict. c. 100, ss. 14, 15, relative thereto, vide post, c. XVIII.

(*r*) By 7 & 8 Geo. 4, c. 27.

receive any chattel, money, or valuable security, or other property whatever, the stealing or taking whereof shall amount to felony, either by common law or by virtue of that Act,—every such receiver shall be guilty of felony (*s*); and may be indicted either as an accessory after the fact, or for a substantive felony; and, however convicted, he is liable at the discretion of the court to penal servitude for a term not exceeding fourteen years nor less than three years, or imprisonment, (with or without hard labour and solitary confinement,) for a term not exceeding three years, and, if a male, to be once, twice or thrice whipped, if the court think fit, in addition to the imprisonment (*t*). And, if any person shall knowingly receive any chattel, money, valuable security, or other property whatever, the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by 7 & 8 Geo. IV. c. 29,—every such receiver is guilty of a misdemeanor, and liable to penal servitude for not more than seven or less than three years; or to be imprisoned, (with or without hard labour and solitary confinement,) for not more than two years, and, if a male, once, twice or thrice whipped, if the court think fit, in addition to the imprisonment (*u*). And where the stealing of any property whatever, is punishable by 7 & 8 Geo. IV. c. 29, by way of summary conviction, either for every offence, or for the first and second offences only, or for the first offence only,—the guilty receiver shall be liable for every first, second, or subsequent offence of receiving, to the forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property, is by the said Act made liable (*x*).

(*s*) It is immaterial that the intention with which he receives them, is for concealment and not for profit. R. *v.* Richardson, 6 Car. & P. 335; R. *v.* Davis, ibid. 177.

(*t*) 7 & 8 Geo. 4, c. 29, s. 54; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*u*) 7 & 8 Geo. 4, c. 29, s. 55; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*x*) 7 & 8 Geo. 4, c. 29, s. 60. As to guilty receivers in the case of anchors, &c., see 1 & 2 Geo. 4, c. 76, s. 10; 9 & 10 Vict. c. 99, s. 29. As to the guilty receiving of chattels,

II. *Malicious mischief* is the next species [of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss; which is some, though a weak excuse; but either out of a spirit of wanton cruelty, or of black and diabolical revenge; in which it bears a near relation to the crime of arson, for as that affects the habitation, so this does the other property of individuals; and therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now,] by a multitude of enactments, [made penal in the highest degree.]

The principal statute on this subject, now in force, is the 7 & 8 Geo. IV. c. 30, "for consolidating and amending the laws in England relative to malicious injuries to property" (*y*). As to which we may premise in general, that though malice is the usual motive for this class of crimes, yet the statute contains an express enactment that its provisions shall equally apply and be enforced, whether the offence shall be committed from malice conceived against

monies or valuable securities fraudulently disposed of within the provisions of the 20 & 21 Vict. c. 54, see sect. 9 of that Act; by which it is made a misdemeanor, and punishable by penal servitude for not more than seven or less than three years, or fine or imprisonment. Vide sup. p. 203.

(*y*) The statutes cited by Blackstone in reference to this subject are 43 Eliz. c. 13, as to rapine on the northern borders;—22 & 23 Car. 2, c. 7, as to burning ricks, stacks, &c. and killing cattle;—4 & 5 W. & M. c. 23, as to burning furze or waste;—1 Ann. stat. 2, c. 9, and 4 Geo. 1, c. 12, as to mariners destroying vessels;—13 Ann. c. 21, as to making holes in ships in distress;—1 Geo. 1, st. 2, c. 48, as to setting underwood, &c., on fire;—all which are repealed by 7 & 8 Geo. 4, c. 27. Also 6 Geo. 1, c. 23, as to malicious injuries to clothes of street passengers, repealed by 7 Geo. 4, c. 64;—9 Geo. 1, c. 22, "The Waltham Black Act," as to setting fire to houses, mills, &c.;—6 Geo. 2, c. 37, and 10 Geo. 2, c. 32, as to injuries to rivers, sea banks, hop-binds, and mines;—11 Geo. 2, c. 22, as to using violence to prevent buying corn and grain, &c.;—28 Geo. 2, c. 19, as to setting fire to gorse, &c.;—6 Geo. 3, cc. 36, 48, and 13 Geo. 3, c. 38, as to destruction of trees and plants, &c.;—9 Geo. 3, c. 29, as to destruction of engines, &c. belonging to mines. All these statutes are repealed by 7 & 8 Geo. 4, c. 27.

the owner of the property in respect of which it shall be committed, or otherwise (*z*).

The Act then proceeds to make provisions against malicious injuries to silk, woollen, and other articles in the loom or frame, or in any stage of manufacture (*a*); to threshing machines or other machines employed in manufactures (*b*); to mines (*c*); to ships, otherwise than by fire (*d*); to sea banks, sea walls, navigable rivers, and bridges (*e*); to turnpike gates and toll houses (*f*); to fishponds and mill-ponds (*g*); to cattle (*h*); to hop-binds (*i*); to trees, saplings, shrubs, and underwood (*k*); to plants, fruits, and vegetable productions in gardens, orchards, nursery grounds, hot-houses, green-houses, or conservatories (*l*); to cultivated roots or plants used for certain purposes, and not growing

(*z*) 7 & 8 Geo. 4, c. 30, s. 25.

(*a*) Sect. 3—felony. The punishment is penal servitude or imprisonment, and (if a male) whipping, if the court think fit, in addition to the imprisonment. (See 16 & 17 Vict. c. 99, and 20 & 21 Vict. c. 3.)

(*b*) Sect. 4—like penalties.

(*c*) Sect. 6—like penalties.

(*d*) Sect. 10—like penalties (as to setting fire to ships, &c., vide 7 Will. 4 & 1 Vict. c. 89, sup. p. 149, et post, p. 210).

(*e*) Sects. 12, 13—like penalties.

(*f*) Sect. 14—misdemeanor; the punishment is fine and imprisonment.

(*g*) Sect. 15—misdemeanor; the punishment is penal servitude or imprisonment, and (if a male) whipping, if the court think fit, in addition to the imprisonment. (See 7 Will. 4 & 1 Vict. c. 99; 16 & 17 Vict. c. 99, and 20 & 21 Vict. c. 3.)

(*h*) Sect. 16—felony; the punishment is penal servitude or imprisonment. (See the Acts cited in last note.)

(*i*) Sect. 18—like penalties.

(*k*) Sects. 19, 20—in parks, &c. if injury exceeds one pound; or not in parks, &c. if injury exceeds five pounds, felony:—the punishment is penal servitude or imprisonment, and (if a male) whipping, if the court think fit, in addition to the imprisonment (see 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3); but if the injury be less than one pound and equal to one shilling, a pecuniary penalty only for the first offence, recoverable before a justice of the peace: for the second offence, imprisonment, with whipping in addition, if the justices think fit · the third offence is felony, punishable as the felony last mentioned. (See Charter *v.* Greame, 13 Q. B. 216; Reg. *v.* Whiteman, 1 Dearsley's C. C. R. 353.)

(*l*) 7 & 8 Geo. 4, c. 30, s. 21—first offence, imprisonment or pecuniary penalty; second offence, felony, punishable as the felony last mentioned.

in a garden, orchard, or nursery-ground (*m*); and to fences, walls, stiles or gates (*n*). All which are made,—according to their several degrees of mischief or malignity,—felonies, misdemeanors, or offences merely punishable with pecuniary penalties on summary conviction before a justice of the peace (*o*). And sect. 24 provides, in general, that if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatever, either of a public or private nature, for which no remedy or punishment is therein before provided,—such offender, being convicted thereof before a justice of the peace, shall forfeit such sum of money as shall appear to the said justice a reasonable compensation for the damage committed, not exceeding five pounds: which sum shall, in the case of private property, be paid to the party aggrieved (*p*), except when property of a public nature or a public right is concerned,—in which case, the money shall be applied to the benefit of the poor of the place where the offence was committed: subject, however, to a proviso that nothing therein contained, shall extend to any case where the party trespassing, acted under a fair and reasonable supposition that he had a right to do the act complained of; nor to any trespass, (not being wilful or malicious,) committed in hunting, fishing, or the pursuit of game.

Also by other statutes it is provided, that whosoever shall unlawfully and maliciously set fire to, or in anywise destroy, any ship or vessel, whether the same be complete

(*m*) 7 & 8 Geo. 4, c. 30, s. 22—for the first offence, imprisonment or pecuniary penalty; for the second offence, imprisonment with hard labour, and (if a male) whipping, if the court direct, in addition to the imprisonment.

(*n*) Sect. 23—for the first offence a pecuniary penalty; for the second, imprisonment, and (if a male) whipping, if the court direct, in addition.

(*o*) As to the punishment, see the last note. As to proceeding before a magistrate, see Millard's case, 1 Dearsley's C. C. R. 166.

(*p*) By 7 & 8 Geo. 4, c. 30, s. 24, another exception from the general rule, that the sum awarded in compensation is to be paid to the party aggrieved,—was where such party was examined as a witness in proof of the offence; but this was abolished by 18 & 19 Vict. c. 126, s. 22.

or in an unfinished state—or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy, any ship or vessel, with intent thereby to prejudice any owner or part-owner (*q*) of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or on any goods on board the same,—shall be guilty of felony: and be liable to penal servitude for life, or not less than fifteen years; or to be imprisoned for not more than three years, with hard labour and solitary confinement, if the court shall so direct, during the imprisonment (*r*). And, also, that whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel,—shall be guilty of felony: and be liable to penal servitude for a term not exceeding fifteen years, or less than ten years; or to be imprisoned for a term not exceeding three years, with hard labour and solitary confinement, if the court direct, during the imprisonment (*s*). And also that whosoever shall unlawfully and maliciously set fire to any mine of coal or cannel coal, shall incur the same penalties as last particularized (*t*). And, further, that whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal or wood, or any steer of wood,—shall be liable to penal servitude for life, or fifteen years; or to be imprisoned, (with or without hard labour and solitary confinement,) for not more than three years (*u*).

(*q*) Though the offender should himself be a part-owner, the case will still fall within the statute. R. *v.* Wallace, 1 Car. & M. 200.

(*r*) 7 Will. 4 & 1 Vict. c. 89, s. 6; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. Where the intent is to commit murder, or endanger life, the offence is a *capital* felony, vide sup. p. 149.

(*s*) 7 Will. 4 & 1 Vict. c. 89, s. 8; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*t*) 7 Will. 4 & 1 Vict. c. 89, s. 9; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*u*) 7 Will. 4 & 1 Vict. c. 89, s. 10;

Again, whoever shall unlawfully and maliciously by any overt act *attempt* to set fire to any vessel or mine, or to any stack or steer, or any vegetable produce, of such kind and with such intent that if the offence were completed the offender would be guilty of felony, and liable to penal servitude for life,—shall, (though there be no actual setting on fire,) be guilty of felony: and he is liable to penal servitude for any term not exceeding fifteen years; or imprisonment (with or without hard labour and solitary confinement) for any term not exceeding two years (*x*).

Moreover, unlawfully and maliciously to destroy or damage anything kept for the purposes of art, science, or literature; or as an object of curiosity in any public repository; or any public statue or monument; or any picture or the like in a place of worship;—is a misdemeanor, punishable with imprisonment for not exceeding six months, and (in case of males) with hard labour or whipping in addition to the imprisonment (*y*).

Also, whoever shall unlawfully and maliciously place or throw in, into, upon, against or near any building or vessel, any gunpowder, or other explosive substance, with intent to do any bodily damage to any person, or to destroy or damage any building or vessel, or any machinery, working tools, fixtures, goods or chattels,—shall, (whether or not any explosion takes place, or injury or damage be actually effected,) be guilty of felony; and be liable to penal servitude for not more than fifteen years, or to be imprisoned for not more than two years (*z*). And the *attempt* by

16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. By 22 Hen. 8, c. 11, maliciously to cut down or destroy the *powdike* in the fens of Norfolk and Ely, is felony. By 15 Car. 2, c. 17, s. 13, the like offence as to the works on the Great Bedford Level, is also felonious. And by 1 & 2 Geo. 4, c. 76, s. 6, and 9 & 10 Vict. c. 99, s. 28, injuring or removing *buoys* is made felony: the punishment for this offence is now penal servitude or imprisonment. (See the provisions just mentioned, and 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.)

(*x*) 9 & 10 Vict. c. 25, s. 7; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*y*) 8 & 9 Vict. c. 44. By 17 & 18 Vict. c. 33, s. 6, "Ornaments, railings or fences" surrounding public statues, are expressly brought within the Act.

(*z*) 9 & 10 Vict. c. 25, s. 6; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

any overt act to set fire to any mine, stack, steer, or vegetable produce, of such kind and with such intent that if the offence were complete the offender would be guilty of felony, and liable to penal servitude for life, is felonious, though such mine, stack, steer, or vegetable produce be not actually set on fire; and the offender is liable to penal servitude for fifteen years, or imprisonment for two years (*a*). And whoever shall knowingly have in his possession, or make or manufacture, any gunpowder, explosive substance, or dangerous or noxious thing; or any machine, engine, instrument, or thing; with intent by means thereof to commit, or for the purpose of enabling any other person to commit, any offence against 9 & 10 Vict. c. 25,—shall be guilty of a misdemeanor, and be liable to be imprisoned for any term not exceeding two years (*b*).

III. [*Forgery* (or the *crimen falsi*) is an offence which is punished by the civil law with deportation or banishment, and sometimes with death (*c*). It may with us be defined, at common law, to be the fraudulent making or alteration of a writing,] or seal, [to the prejudice of another man's right;] or of a stamp, to the prejudice of the revenue (*d*). In reference to this crime, as regards writings, it has been decided, that the instrument forged must so far resemble the true instrument as to be capable of deceiving persons who use ordinary observation (*e*): that any material alteration, (however slight,) is a forgery, as well as an entire fabrication (*f*): that the fraudulent application of a false signature to a true instrument, or

If the intent is to commit murder or endanger life, the case is still more penal, vide sup. p. 149.

(*a*) 9 & 10 Vict. c. 25, s. 7; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*b*) 9 & 10 Vict. c. 25, s. 8. In any case in which the offender convicted under this Act, is a male under eighteen, whipping may be added to his other sentence; and where imprisonment may be awarded, it may be with hard labour and solitary confinement.

(*c*) 4 Inst. 18, 7.

(*d*) 2 East, P. C. c. xix. s. 60.

(*e*) R. *v.* Collicott, R. & R. C. C. R. 212; S. C. 229.

(*f*) 2 East, P. C. c. xix. s. 4.

a real signature to a false one, are consequently both forgeries (*g*): and that even if the name forged be merely a fictitious one, it is as much forgery, if done for the purpose of fraud, as if the name were that of a real person (*h*). It may also be remarked, that by 9 Geo. IV. c. 32, it was provided (even before the late change of law, by which interested parties are now allowed to be competent witnesses (*i*),) that the party whose name is forged may be a witness to prove that the writing is not his; but that on the other hand, it is an established rule, that the proof of forgery by a mere comparison of handwriting is not admissible (*k*). At common law, this offence was a misdemeanor only; but when in the progress of society, the perpetration of it became more easy, and its tendencies more dangerous, it became necessary to assign to it a more penal character, as regards those instruments which most required protection.

The principal Act as to this offence, 11 Geo. IV. & 1 Will. IV. c. 66, among other provisions, makes the offence of forging the Great Seal, the Privy Seal or any Privy Signet, the Sign-manual, the Seals of Scotland, or the Great Seal and Privy Seal of Ireland,—treason (*l*): and makes the offence of forging, (or uttering with intent to defraud,) stamps, exchequer bills, bank of England notes, bills of exchange, promissory notes, deeds, receipts (*m*), orders for the payment of money (*n*), transfers of stock, wills, and a variety of other documents, (comprising all that are in the most ordinary use in the transactions of mankind)—felony. It attaches also the same felonious character, to the offence even of having in possession, without law-

(*g*) 3 Chit. Crim. Law, 1038, cites 1 Hale, P. C. 683; et vide 2 East, P. C. ubi sup.

(*h*) R. *v.* Bontien, R. & R. C. C. R. 260.

(*i*) Vide sup. vol. III. pp. 607, 608.

(*k*) Doe *v.* Suckermore, 5 A. & E. 703. See Taylor on Evidence, p. 1428, n. (5), 2nd edit.

(*l*) As to this species of treason, (which is now not punishable by death,) vide post, pp. 231, 232.

(*m*) Clark *v.* Newsam, 1 Exch. 131.

(*n*) See Queen *v.* Dawson, 20 L. J. (M. C.) 102.

ful excuse, (such excuse to be proved by the party accused,) any forged bank note or the like, knowing it to be forged; or of having in possession, (without such excuse,) any frames, mould, &c. for paper, with the names of any banker visible in the substance of the paper (*o*).

The punishment of this offence at common law, and as a mere misdemeanor, was fine, imprisonment and pillory; but in the cases in which it was made treason or felonious, it was deemed necessary also to inflict on the offender the extreme penalty of death. Capital punish-

(*o*) Besides the 11 Geo. 4 & 1 Will. 4, c. 66, there are very numerous statutes containing provisions against forgery in particular cases.

Forgery as to *records and process.*—8 Hen. 6, c. 12; 8 Rich. 2, c. 4; 2 & 3 Ann. c. 4; 5 & 6 Ann. c. 18; 7 Ann. c. 20; 8 Geo. 2, c. 6; 52 Geo. 3, c. 143; 1 & 2 Vict. c. 94; 14 & 15 Vict. c. 99, s. 17.

As to *public funds and stocks.*—9 Geo. 1, c. 12; 35 Geo. 3, c. 66; 37 Geo. 3, c. 16; 48 Geo. 3, c. 142; 49 Geo. 3, c. 64; 52 Geo. 3, c. 129; 5 Geo. 4, c. 53; 10 Geo. 4, cc. 24, 50; 5 Vict. c. 8; 5 & 6 Vict. c. 66.

As to *securities of public companies.*—9 Ann. c. 21; 6 Geo. 1, cc. 4, 11, 18; 39 Geo. 3, c. 83; 1 Will. 4, c. 66.

As to *stamps.*—10 Ann. c. 19; 12 Ann. st. 2, c. 9; 3 Geo. 1, c. 7; 6 Geo. 1, c. 4; 4 Geo. 3, c. 37; 13 Geo. 3, cc. 52, 56; 24 Geo. 3, sess. 2, c. 53; 52 Geo. 3, c. 143; 54 Geo. 3, cc. 133, 144; 55 Geo. 3, c. 184; 1 Geo. 4, c. 58; 5 Geo. 4, c. 52; 7 & 8 Geo. 4, c. 28; 9 Geo. 4, c. 18; 2 & 3 Will. 4, c. 120; 3 & 4 Will. 4, c. 97; 6 & 7 Will. 4, c. 69; 3 & 4 Vict. c. 96; 4 & 5 Vict. c. 58; 5 & 6 Vict. c. 35; 6 & 7 Vict. c. 86; 7 Vict. c. 19; 7 & 8 Vict. c. 22; 14 & 15 Vict. c. 99, s. 17.

As to *official documents.*—2 & 3 Ann. c. 4; 12 Geo. 1, c. 32; 4 Geo. 2, c. 18; 32 Geo. 2, cc. 14, 55; 23 Geo. 3, c. 70; 42 Geo. 3, c. 116; 46 Geo. 3, cc. 45, 69, 75, 76; 48 Geo. 3, c. 82; 50 Geo. 3, c. 41; 52 Geo. 3, c. 143; 53 Geo. 3, c. 151; 54 Geo. 3, cc. 133, 151; 57 Geo. 3, c. 34; 1 Geo. 4, c. 35; 3 Geo. 4, c. 86; 5 Geo. 4, c. 113; 6 Geo. 4, cc. 78, 113; 7 Geo. 4, c. 16; 7 & 8 Geo. 4, cc. 28, 53; 10 Geo. 4, cc. 24, 50; 11 Geo. 4 & 1 Will. 4, c. 20; 2 Will. 4, cc. 16, 34; 2 & 3 Will. 4, cc. 1, 106, 120, 125; 3 & 4 Will. 4, cc. 51, 97; 4 & 5 Will. 4, c. 15; 5 & 6 Will. 4, cc. 24, 45, 51; 6 & 7 Will. 4, cc. 5, 85, 86; 7 Will. 4 & 1 Vict. cc. 23, 86; 1 Vict. c. 36, s. 34; 2 & 3 Vict. c. 51; 3 & 4 Vict. cc. 92, 96; 5 Vict. c. 8; 5 & 6 Vict. cc. 35, 66; 6 & 7 Vict. c. 86; 7 & 8 Vict. c. 19; 12 & 13 Vict. c. 106, s. 273; 16 & 17 Vict. c. 131, s. 52; 18 & 19 Vict. c. 42. See also 8 & 9 Vict. c. 113, and 14 & 15 Vict. c. 99, s. 17, as to the forging of official, judicial, and public documents in general, and copies of private acts of parliament, and 16 & 17 Vict. c. 2, (amending 1 Geo. 4, c. 92,) as to forgery of Bank of England notes.

ment, however,—having been previously abolished, with regard to many cases of forgery, by 11 Geo. IV. & 1 Will. IV. c. 66, and 2 & 3 Will. IV. c. 123,—was altogether taken away, as a punishment for this offence, by 7 Will. IV. & 1 Vict. c. 84 (*p*). And now the offender is liable, at the discretion of the court, to penal servitude for life or not less than three years; or to imprisonment for not more than four years or less than two years, with or without hard labour and solitary confinement (*q*).

IV. As to *obtaining property by false personation.* Frauds of this description also were indictable, at common law, as misdemeanors, and punishable by fine and imprisonment (*r*), but are now made penal by the express provision of acts of parliament. Thus, to personate any soldier, in order fraudulently to receive his pay, pension, or wages, is felony; and punishable by penal servitude for life or such term of years as the court shall adjudge:—or if the personation be for the purpose of obtaining prize money, with penal servitude for life or for not less than three years (*s*). Again, to personate any seaman or marine, with a like fraudulent intention, is also felony; and punishable with penal servitude for life or not less than three years, or imprisonment for not more than four or less than two years (*t*). And the false personation of an owner of stock

(*p*) It remained capital, till the Act last mentioned, to forge a will or testamentary writing, a power of attorney, or other authority to transfer stock or receive dividends; and in certain other instances. (See 2 & 3 Will. 4, c. 123; 5 & 6 Will. 4, cc. 45, 51.)

(*q*) 7 Will. 4 & 1 Vict. c. 84, ss. 1, 2; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to the *indictment* for forgery, and the provisions of 2 & 3 Will. 4, c. 123, s. 3, and 14 & 15 Vict. c. 100, ss. 5, 6, 8, relative thereto, vide post, c. XVIII.

(*r*) 2 East, P. C. c. XX. s. 5.

(*s*) 7 Geo. 4, c. 16, s. 38 (see Pringle's case, 2 Moody, C. C. 127); 2 Will. 4, c. 53, s. 49; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. By 2 Will. 4, c. 33, s. 49, a provision similar to that mentioned in the text, contained in 5 Geo. 4, c. 107, is repealed.

(*t*) 11 Geo. 4 & 1 Will. 4, c. 20, s. 84; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

of the Bank of England, or of any body corporate or society established by charter or act of parliament; or to personate an owner of a dividend; and thereby endeavouring to transfer his share or receive money due to the true owner—is a felony, and liable to a similar punishment (*u*).

V. *Obtaining property by false pretences.* This offence, which, like the last, is closely allied to larceny, though distinguishable from it as being perpetrated through the medium of a mere *fraud*,—was likewise a misdemeanor, at common law, punishable by fine and imprisonment; and now, by statute, after reciting that "a failure of justice frequently arises from the subtle distinction between larceny and fraud," it is provided, that if any person shall, by any false pretence, obtain from any other person any chattel, money or valuable security, with intent to cheat or defraud any person of the same, he shall be guilty of a misdemeanor and be liable to penal servitude for not more than seven or less than three years; or be punished by fine or imprisonment, or both, as the court shall award (*x*): provided always, that if, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor (*y*).

(*u*) 11 Geo. 4 & 1 Will. 4, c. 66, s. 7; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*x*) 7 & 8 Geo. 4, c. 29, s. 53; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to what is considered as a *false pretence* under 7 & 8 Geo. 4, c. 29, s. 53, see the following cases:—R. *v.* Crossley, 2 M. & Rob. 17; R. *v.* Ady, 7 Car. & P. 140; R. *v.* Asterley, ibid. 191; R. *v.* Williams, ibid. 354; R. *v.* Barnard, ibid. 784; R. *v.* Reed, 848; R. *v.* Masterton, 2 Cox's Cr. C. 100; Reg. *v.* Sherwood, 5 W. R. (C. C. R.) 577; Eagleton's case, 1 Dearsley's C. C. R. 515. As to the term *valuable security*, see Reg. *v.* Greenhalgh, 1 Dearsley's C. C. R. 267; R. *v.* Danger, 5 W. R. (C. C. R.) 738.

(*y*) As to the *indictment* for this offence, and the provisions of 14 & 15 Vict. c. 100, ss. 8, 18, relative thereto, vide post, c. XVIII. See also 20 & 21 Vict. c. 54, ss. 6, 8, sup. pp. 202, 203.

CHAPTER VI.

OF OFFENCES AGAINST THE GOVERNMENT.

THE order of our distribution will next lead us to take into consideration, such crimes and misdemeanors as affect men not in their capacity of individuals, and in respect of their persons or property, but in their capacity of members of the commonwealth; and in respect of those rights which are common to all the subjects of the realm. These may be divided into seven species; viz., offences against the sovereign or civil government; against religion; against the law of nations; against public justice; against the public peace; against the public trade; against the public health, police or economy. Under the first of these heads we shall advert, in the first place, to the crime of treason.

I. [Treason, *proditio,* in its very name, which is borrowed from the French (*a*), imports a betraying, treachery, or breach of faith;] and the crime of which we here speak, is treachery against the sovereign or liege lord (*b*): and as

(*a*) According to Lord Coke it comes from *trahir*. 3 Inst. 4.

(*b*) "It therefore happens only "between allies," saith the Mirror, c. 1, s. 7, "for treason is indeed a "general appellation made use of "by the law to denote not only of- "fences against the king and govern- "ment, but also that accumulation "of guilt which arises whenever a "superior reposes a confidence in a "subject or inferior between whom "and himself there exists a natural, "civil, or even a spiritual relation; "and the inferior so abuses that "confidence, so forgets the obliga- "tions of duty, subjection and alle- "giance, as to destroy the life of "any such superior or lord. This "is looked upon as proceeding from "the same principle of treachery in "private life as would have urged "him who harbours it to have con- "spired in public against his liege

it is [the highest civil crime which, considered as a member of the community, any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of treason be indeterminate, this alone, (says the president Montesquieu,) is sufficient to make any government degenerate into arbitrary power (*c*); and yet, by the antient common law, there was a great latitude left in the breast of the judges to determine what was treason or not so, whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons: that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason which never were suspected to be such. Thus the *accroaching* or attempting to exercise royal power—a very uncertain charge—was, in the twenty-first year of Edward the third, held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90*l.* (*d*); a crime, it must be owned, well deserving of punishment, but which seems to be of a complexion very different from that of treason. Killing the king's father or brother, or even his messenger, has also fallen under the same denomination (*e*): the latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius; which determines that any attempts or designs against the ministers of the prince shall be treason (*f*). But, however, to prevent the inconveniences

" lord and sovereign; and therefore " for a wife to kill her lord or husband, a servant his lord or master, " and an ecclesiastic his lord or ordinary; these being breaches of " the lower allegiance of private " and domestic faith, are denominated *petit* treasons. But when " disloyalty so rears its crest as to " attack even majesty itself, it is " called, by way of eminent distinction, *high* treason, being equivalent to the *crimen læsæ majestatis* of the Romans." (4 Bl. Com. 75.) Since the time of Blackstone *petit* treason has been abolished (9 Geo. 4, c. 31, s. 2), and it has been thought therefore inexpedient to retain the correlative term of *high* treason in these Commentaries.

(*c*) Sp. L. b. xii. c. 7.

(*d*) 1 Hale, P. C. 80.

(*e*) Britt. c. 22; Hawk. P. C. b. 1, c. 17, s. 1.

(*f*) "*Qui de nece virorum illustrium, qui consiliis et consistorio nostro*

[which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2, was made, which defines what offences only, for the future, should be held to be treason; in like manner as the *lex Julia majestatis* among the Romans, promulged by Augustus Cæsar, comprehended all the antient laws that had before been enacted to punish transgressors against the State (*g*).] We shall find that, under this statute, the crime of treason consists of five distinct branches (*h*).

1. [" When a man doth compass or imagine the death "of our lord the king, of our lady his queen, or of their " eldest son and heir." Under this description it is held that a queen regnant (*i*),—such as Queen Elizabeth and Queen Anne,] and our present gracious sovereign Queen Victoria,—[is within the words of the Act, being invested with royal power, and entitled to the allegiance of her subjects (*k*); but the husband of such a queen is not comprised within these words, and therefore no treason can be committed against him (*l*). The king here intended is the king in possession, without any respect to his title; for it is held that a king *de facto*, and not *de jure*, or, in other words, an usurper that hath got possession of the throne, is a king within the meaning of the statute; as there is a temporary allegiance due to him for his administration of

intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cujuslibet postremo, qui militat nobiscum, cogitaverit (eâdem enim severitate voluntatem sceleris, quâ effectum, puniri jura voluerint); ipse quidem, utpote majestatis reus, gladio feriatur, bonis ejus omnibus fisco nostro addictis."—Cod. 9, 8, 5.

(*g*) Gravin. Orig. 1, s. 34.

(*h*) Blackstone notices two additional species of treason under the statute of Edward the third, viz. 1, " counterfeiting the king's great or " privy seal;" and 2, " counterfeit- " ing the king's money, and bring- " ing false money into the realm, " counterfeit to the money of Eng " land, knowing the same to be false, " to merchandize and make payment " withal." But the first of these was repealed by 11 Geo. 4 & 1 Will. 4, c. 66, which re-enacted this species of treason in a new form (sects. 2, 31, et vide sup. p. 213); and the second was repealed by 2 Will. 4, c. 34, and ranks now merely as the offence of coining; as to which, vide post, c. VI.

(*i*) 1 Hale, P. C. 101.

(*k*) Vide R. *v.* Oxford. 9 Car. & P. 525.

(*l*) 3 Inst. 7; 1 Hale, P. C. 106.

[the government and temporary protection of the public; and therefore treasons committed against Henry the sixth were punished under Edward the fourth, though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king *de jure*, and not *de facto*, who hath never had plenary possession of the throne,—as was the case of the house of York, during the three reigns of the line of Lancaster,—is not a king, within this statute, against whom treasons may be committed (*m*). And a very sensible writer on the Crown law (*n*) carries the point of possession so far, that he holds that a king out of possession, is so far from having any right to our allegiance by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him: a doctrine which he grounds upon the statute 11 Hen. VII. c. 1; which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do assist and obey a king *de facto*. But in truth this seems to be confounding all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power, though not the name of king, the people were bound in duty to hinder the son's restoration; and were any foreign prince to invade this kingdom, and by any means to get possession of the Crown—a term, by the way, of very loose and indistinct signification—the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry the seventh, does by no means *command* any opposition to a king *de jure*, but *excuses* the obedience paid to a king *de facto*. When therefore an usurper is in possession, the subject is *excused* and *justified* in obeying and giving him assistance; otherwise, under an usurpation, no man could be safe, if the lawful prince had a right to hang him for

(*m*) 3 Inst. 7; 1 Hale, P. C. 104. (*n*) Hawk. P. C. b. 1, c. 17, s. 16.

[obedience to the powers in being, as the usurper would certainly do for disobedience. Nay, further, as the mass of people are imperfect judges of title, (of which, in all cases, possession is *primâ facie* evidence,) the law compels no man to yield obedience to that prince, whose right is, by want of possession, rendered uncertain and disputable till Providence shall think fit to interpose in his favour, and decide the ambiguous claim; and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is (according to Sir M. Hale,) no longer the object of treason (*o*). And the same reason holds in case the king abdicates the government, or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution; since, as was formerly observed (*p*), when the fact of abdication is once established and determined by the proper judges, the consequence necessarily follows that the throne is thereby vacant, and he is no longer king.

Let us next see what is a *compassing* or *imagining* the death of the king, &c. These are synonymous terms; the word *compass*, signifying the purpose or design of the mind or will (*q*); and not, as in common speech, the carrying such design into effect (*r*): and, therefore, an accidental stroke, which may mortally wound the sovereign *per infortunium*, without any traitorous intent, is no treason: as was the case of Sir Walter Tyrrel; who, by the command of King William Rufus, shooting at a hart, the arrow glanced against a tree and killed the king upon the spot (*s*). But as this compassing or imagining is an act of the mind, it cannot possibly fall under any judicial cognizance, unless

(*o*) 1 Hale, P. C. 104.

(*p*) Vide sup. vol. II. p. 445.

(*q*) By the antient law the *compassing* or intending the death of any man, if demonstrated by some evident fact, was equally penal as homicide itself. 3 Inst. 5.

(*r*) 1 Hale, P. C. 107.

(*s*) 3 Inst. 6.

[it be demonstrated by some open or *overt* act. And yet the tyrant Dionysius is recorded (*t*) to have executed a subject barely for dreaming that he had killed him; which was held for sufficient proof, that he had thought thereof in his waking hours.

But such is not the temper of the English law; and therefore it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon (*u*). The statute expressly requires that the accused "be thereof, upon sufficient proof, attainted of "some open act by men of his own condition." Thus to provide weapons or ammunition for the purpose of killing the king, is held to be a palpable overt act of treason in imagining his death (*x*).

To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king's death (*y*): for all force, used to the person of the king, in its consequence may tend to his death; and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. There is no question, also, but that taking any measures to render such treasonable purposes effectual,—as assembling and consulting on the means to kill the king,—is a sufficient overt act of treason (*z*).

(*t*) Plutarch *in vit.*

(*u*) By 7 Will. 3, c. 3, s. 8, it is provided, "that no evidence shall be "admitted or given of any overt act "that is not expressly laid in the in-"dictment, against any person or per-"sons whatsoever." And this seems to extend to all treasons whereby any corruption of blood may ensue.

(*x*) 3 Inst. 12.

(*y*) 1 Hale, P. C. 109.

(*z*) "The law tendereth the safety "of the king with an anxious con-"cern, and, if I may use the ex-"pression, with a concern bordering "on jealousy. It considereth the "wicked imaginations of the heart "in the same degree of guilt as if "carried into actual execution, from "the moment measures appear to "have been taken to render them "effectual; and therefore if conspi-"rators meet and consult how to "kill the king, though they do not "then fall upon any scheme for that "purpose, this is an overt act of "compassing his death; and so are "all means made use of,—be it ad-

[How far mere *words* spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances in the reign of Edward the fourth, of persons executed for treasonable words,—the one a citizen of London, who said he would make his son heir of the *crown*, being the sign of the house in which he lived; the other a gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly (*a*) These were esteemed hard cases: and the Chief Justice Markham rather chose to leave his place, than assent to the latter judgment (*b*). But now it seems clearly to be agreed, that by the common law and the statute of Edward the third, words spoken amount only to a high misdemeanor and no treason. For they may be spoken in heat, without any intention; or be mistaken, perverted, or misremembered by the hearers; their meaning depends always on their connexion with other words and things; they may signify differently, even according to the tone of voice with which they are de-

"vice, persuasion, or command,—to "incite or encourage others to commit the fact or join in the attempt; and every person who but "assenteth to any overtures for that "purpose, will be involved in the "same guilt.

"The care the law hath taken for "the personal safety of the king is "not confined to actions or attempts "of the more flagitious kind—to "assassination or poison, or other "attempts directly or immediately "aiming at his life: it is extended "to everything wilfully and deliberately done or attempted, whereby "his life may be endangered: and "therefore the entering into measures for deposing or imprisoning "him, or to get his person into the "power of the conspirators—these "offences are overt acts of treason "within this branch of the statute, "for experience has shown that, between the prisons and the graves "of princes, the distance is very "small."—Fost. 194, 195.

(*a*) 1 Hale, P. C. 115; 4 Bl. Com. p. 80. The cases here referred to by Blackstone are those of William Walker and of Sir Thomas Burdet: but it is said in Stow's Chron. p. 415, that the charge against Walker was for words spoken against the title of the king when he was proclaimed; and it appears from Cro. Car. p. 121, that the charge against Burdet was of having conspired to kill the king and prince by casting their nativity, foretelling their speedy death, and scattering papers containing the prophecy amongst the people.—See Foss's Judges of England, vol. iv. pp. 414—416.

(*b*) 1 Hale, P. C. 115.

[livered; and sometimes silence itself is more expressive than any discourse. As, therefore, there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to treason; and accordingly in the fourth year of Charles the first, on a reference to all the judges, concerning some very atrocious words spoken by one Pyne, they certified to the king, "that though the words were as wicked as might be, yet "there was no treason: for, unless it be by some particular "statute, no words will be treason (*c*)." If the words be set down in writing it argues more deliberate intention; and it has been held that writing is an overt act of treason, for *scribere est agere*. But even in this case, the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason: particularly in the cases of one Peachum, a clergyman, for treasonable passages in a sermon never preached (*d*); and of Algernon Sidney for some papers found in his closet; which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt acts of that treason, which was specially laid in the indictment (*e*). But being merely speculative, without any intention, so far as appeared, of making any public use of them, the convicting the authors upon such an insufficient foundation has been universally disapproved. Peachum was therefore pardoned; and though Sidney indeed was executed, yet it was to the general discontent of the nation, and his attainder was afterwards reversed by parliament. There was then no manner of doubt but that the publication of such a treasonable writing, was a sufficient overt act of treason at the common law (*f*); though of late even that has been questioned.

(*c*) Pyne's case, Cro. Car. 117; Williams's case, ibid. 126.

(*d*) Williams's case, ubi sup.

(*e*) Foster, 198.

(*f*) 1 Hale, P.C. 118; Hawk. P. C. b. 1, c. 17, s. 32.

[2. The second species of treason is "if a man do violate "the king's companion, or the king's eldest daughter un-"married, or the wife of the king's eldest son and heir." By the king's companion is meant his wife; and by violation is understood carnal knowledge, as well without force as with it; and this is treason in both parties, if both be consenting, as some of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious; and therefore when this reason ceases, the law ceases with it; for to violate a queen, or princess, dowager is held to be no treason (*g*). In like manner as, by the feudal law, it was a felony and attended with a forfeiture of the fief, if the vassal vitiated the wife, or daughter, of his lord (*h*); but not so if he only vitiated his widow (*i*).

3. The third species of treason is, "if a man do levy "war against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion or the laws (*k*), or to remove evil counsellors, or other grievances, whether real or pretended (*l*). For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power for these purposes in the high court of parliament: neither does the constitution justify any private or particular resistance, for private or particular

(*g*) 3 Inst. 9. The instances specified in the statute, however, do not prove much consistency in the application of this reason; for there is no protection given to the wives of the younger sons of the king; though their issue must inherit the crown before the issue of the king's eldest daughter: and her chastity is only inviolable before marriage, whilst her children would be clearly illegitimate. Before the twenty-fifth year of Edward the third, it was held to be treason not only to violate the wife and daughter of the king, but also the nurses of his children, *les norices de lour enfans*. (Christian's Blackstone.)

(*h*) Feud. l. 1, t. 5.

(*i*) Ibid.

(*k*) Doug. 590.

(*l*) Hawk. P. C. b. 1, c. 17, s. 25.

[grievances: though in cases of national oppression, the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them, is a levying of war; and so is an insurrection with an avowed design to pull down *all* inclosures, *all* brothels and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority (*m*). But a tumult with a view to pull down a particular house, to lay open a particular enclosure, amounts at most to a riot; this being no general defiance of public government. So if two subjects quarrel and levy war against each other, (in that spirit of private war which prevailed over all Europe in the early feudal times (*n*),) it is only a great riot and contempt, and no treason. Thus it happened between the Earls of Hereford and Gloucester, in the twentieth year of Edward the first; who raised each a little army, and committed outrages upon each other's lands; burning houses, attended with the loss of many lives: yet this was held to be no treason, but only a great misdemeanor (*o*). A bare conspiracy to levy war, does not amount to this species of treason; but if particularly pointed at the person of the king or his government, it falls within the first species,—viz., of compassing or imagining the king's death (*p*).

4. "If a man be adherent to the king's enemies in his "realm, giving to them aid and comfort in the realm or "elsewhere," he is also declared guilty of treason. This must likewise be proved by some overt act, as by giving them intelligence (*q*); by sending them provisions; by selling them arms; by treacherously surrendering them a fortress, or the like (*r*). By enemies are here understood the sub-

(*m*) 1 Hale, P. C. 132.

(*n*) Robertson, Car. V., vol. i. 45, 286.

(*o*) 1 Hale, P. C. 136.

(*p*) 3 Inst. 9; Foster, 211, 213.

(*q*) Dr. Hensy's case, 1 Burr. 650; R. *v.* Stone, 6 T. R. 527.

(*r*) 3 Inst. 10.

[jects of foreign powers with whom we are at open war. As to foreign pirates or robbers who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, —the giving them assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom (*s*), or else in that of levying war against his majesty. And, most indisputably, the same acts of adherence or aid, which, when applied to foreign enemies, will constitute treason under this branch of the statute, will, when afforded to our own fellow-subjects in actual rebellion at home, amount to the same crime, under the description of levying war against the king (*t*). But to relieve a rebel, fled out of the kingdom, is no treason; for the statute is taken strictly, and a rebel is not an *enemy*; an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England (*u*). And, if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he hath a safe opportunity.]

5. [The last species of treason under this statute is, "If "a man slay the chancellor, treasurer, or the king's jus-"tices of the one bench or the other, justices in eyre or "justices in assize, and all other justices assigned to hear "and determine, being in their places doing their offices." These high magistrates, as they represent the king's majesty during the execution of their offices, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not to wounding or a bare attempt to kill them. It extends also only to the officers therein specified; and therefore the

(*s*) Foster, 219.
(*t*) Ibid. 216.
(*u*) Hawk. P. C. b. 1, c. 17, s. 28.

[barons of the Exchequer, as such, are not within the protection of this act (x); but the lord keeper, or commissioners, of the Great Seal now seem to be within it,—by virtue of the statutes 5 Eliz. c. 18, and 1 Will. & Mary, c. 21 (y).

Thus careful was the legislature in the reign of Edward the third, to specify and reduce to a certainty the vague notions of treason that had formerly prevailed in our courts. But the Act does not stop here, but goes on: "Because "other like cases of treason may happen in time to come, "which cannot be thought of or declared at present, it is "accorded, that if any other case supposed to be treason, "which is not above specified, doth happen before any "judge, the judge shall tarry without going to judgment "of the treason, till the cause be showed and declared "before the king and his parliament, whether it ought to "be judged treason or other felony." Sir M. Hale (z) is very high in his encomiums on the great wisdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this Act, by not suffering them to run out upon their own opinions into constructive treasons, though in cases that seem to them to have a like parity of reason; but reserving them to the decision of parliament. This is a great security to the public, the judges, and even this sacred Act itself; and leaves a weighty *memento* to judges to be careful, and not overhasty in letting in treasons by construction or interpretation, especially in new cases that have not been resolved and settled.

(x) 1 Hale, P. C. 231.

(y) By the statute 7 Anne, c. 21, it is made treason to slay any of the lords of session, or lords of justiciary, sitting in judgment; it is also provided, that the crimes of treason, and misprision of treason, shall be exactly the same in England and Scotland; and that no acts in Scotland, except those above specified, shall be construed as treason in Scotland, which are not treason in England; and that all persons prosecuted in Scotland, for treason, or misprision thereof, shall be tried in the same manner as if they had been prosecuted for the same crime in England.

(z) 1 Hale, P. C. 259.

[He also observes, that as the authoritative decision of these *casus omissi* is reserved to the king and parliament, the most regular way to do it is by a new declarative Act; and therefore the opinion of any one or of both houses, (though of very respectable weight,) is not that solemn declaration referred to by this Act, as the only criterion for judging of future treasons.

In consequence of this power,—not originally indeed granted by the statute of Edward the third, but constitutionally inherent in every subsequent parliament, which cannot be abridged of any rights by the act of a precedent one,—the legislature was extremely liberal in declaring new treasons in the unfortunate reign of King Richard the second; as particularly the killing of an ambassador was made so; which seems to be founded upon better reason than the multitude of other points that were then strained up to this high offence; the most arbitrary and absurd of all which was by the statute 21 Richard II. c. 3,—which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, treason. And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And in the very first year of his successor's reign an Act was passed (*a*), reciting "that no man knew how he ought to behave him-"self, to do, speak or say, for doubt of such pains of trea-"son; and therefore it was accorded, that in no time to "come any treason be judged, otherwise than was ordained "by the statute of King Edward the third." This at once swept away the whole load of extravagant treasons, introduced in the time of Richard the second.

But afterwards, between the reign of Henry the fourth and Queen Mary, and particularly in the bloody reign of Henry the eighth, the spirit of inventing new and strange treasons was revived: among which we may reckon the offences of clipping money; breaking prison or rescue when

(*a*) Stat. 1 Hen. 4, c. 10.

[the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welshmen; counterfeiting foreign coin; wilful poisoning; execrations against the king, calling him opprobrious names by public writing; refusing to abjure the pope; deflowering or marrying, without the royal licence, any of the king's children, sisters, aunts, nephews or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing*, (manifested by an overt act,) the king to have been lawfully married to Anne of Cleves; derogating from the king's royal style and title, impugning his supremacy, and assembling riotously to the number of twelve, and not dispersing upon proclamation: all which new-fangled treasons were totally abrogated by the statute] 1 Edward VI. c. 12 (confirmed by statute [1 Mary, c. 1), which once more reduced all treasons to the standard of the statute of the twenty-fifth year of Edward the third;] since which time, however, addition has been made to the number of treasonable offences created by act of parliament. [By statute 1 Anne, st. 2, c. 17, s. 3, if any person shall endeavour to deprive or hinder any person, being the next in succession to the Crown according to the limitations of the act of settlement, from succeeding to the Crown, and shall maliciously and directly attempt the same by any overt act, - such offence shall be treason. By statute 6 Anne, c. 7, if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm that any other person hath any right or title to the Crown of this realm, otherwise than according to the act of settlement; or that the kings of this realm, with the authority of parliament, are not able to make laws and statutes to bind the Crown and the descent thereof,—such person shall be guilty of treason. This offence, or indeed maintaining this doctrine in anywise that the king and parliament cannot limit the Crown, was once before made treason by statute

[13 Eliz. c. 1, during the life of that princess. And after her decease, it continued a high misdemeanor; punishable with forfeiture of goods and chattels, even in the most flourishing era of indefeasible hereditary right, and *jure divino* succession. But it was again raised into treason, by the statute of Anne before mentioned, at the time of a projected invasion in favour of the then pretender; and upon this statute one Matthews, a printer, was convicted and executed, in 1719, for printing a treasonable pamphlet, entitled "*Vox populi vox Dei*" (*b*).] By 36 Geo. III. c. 7 (*c*), if any person shall, within the realm or without, compass, imagine or intend death, destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the king; and shall express, utter or declare such intention by publishing any printing or writing, or by any overt act,—he shall be adjudged a traitor (*d*). And lastly, by 11 Geo. IV. & 1

(*b*) State Tr. ix. 680.

(*c*) The statute mentioned in the text was made perpetual by 57 Geo. 3, c. 6; and it having been doubted whether it extended to Ireland, it is now expressly extended to that country by 11 & 12 Vict. c. 12. It was also provided by 36 Geo. 3, c. 7, that it should be treason to compass, imagine or intend to levy war within the realm, in order by force to compel the sovereign to change his measures or counsels; or to overawe either house of parliament; or to stir any foreigner with force to invade this realm, or any of the king's dominions: and to express, utter or declare such intention by publishing any printing or writing, or by any overt act; but as to this part of its enactments, the statute is now repealed, and the offences are differently dealt with by 11 & 12 Vict c. 12; as to which, vide post, p. 236.

(*d*) It is to be observed, that, in addition to the statutes mentioned in the text, it is provided by 3 & 4 Vict. c. 52, s. 4, (having reference to the contingency of any issue of her present majesty ascending the throne while under the age of eighteen,) that every person who shall be aiding or abetting in obtaining or bringing about any marriage to such issue (for whom a regent is appointed by that Act), under the age of eighteen, without the consent in writing of such regent, and the assent of both houses of parliament previously obtained,—shall, (as well as the person who is so married to such issue,) be guilty of treason.

Besides the above enumerated treasons created since the statute of 1 Mar. c. 1, Blackstone mentions many others, which he divides into —1st, such as relate to Papists; 2nd, such as relate to falsifying the coin and other royal signatures; and 3rd,

Will. IV. c. 66, s. 2, forging the Great Seal of the united kingdom, the Privy Seal, any Privy Signet, the Sign manual, the Seals of Scotland, or the Great Seal or Privy Seal of Ireland,—is declared to be treason.

[Thus much for the crime of treason, or *læsæ majestatis*, in all its branches; which consists, we may observe, originally, in grossly counteracting that allegiance which is due from the subject by either birth or residence; though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them to depart a little from this primitive idea. It is now, however, time to pass on from defining the crime, to describing its punishment.]

The offence of treason is, (by exception from the general rule of the Crown law,) subject to limitation in respect of time. For by 7 Will. III. c. 3, no person shall be prosecuted for treason, but within three years after the commission of the offence; except in the case of a designed assassination of the sovereign, by poison or otherwise (*e*).

[The punishment of treason in general is very solemn and terrible.] 1. That the offender be drawn on a hurdle, to the place of execution. 2. That he be hanged by the neck, until he be dead. 3. That his head be severed from the body. 4. That his body be divided into four quarters. 5. That his head and quarters shall be at the disposal of the Crown. But the king may, after sentence, by warrant under his sign-manual countersigned by a principal secretary of state, change the whole sentence into beheading. And the sentence upon women, (the decency due to whose

such as were created for the security of the Protestant succession, &c. But the statutes of the two first classes have been repealed by the 7 & 8 Vict. c. 102, and 2 Will. 4, c. 34; and those of the third, (with the exception of such as are noticed in the text,) have lost their importance by the extinction of the line of the Pretender.

(*e*) As to the law relative to the manner of indictment, arraignment, trial and attainder in treason (which is in some respects peculiar), vide post, cc. XVIII. XXII.

sex forbids the exposing and publicly mangling their bodies) is, to be drawn to the place of execution, and hanged by the neck until they be dead (*f*).

In the case of treason by counterfeiting the Seals, the punishment is not capital, but penal servitude for life, or for not less than three years; or imprisonment for any term not more than four or less than two years, with or without hard labour and solitary confinement (*g*).

[The consequences of judgment for the crime of treason, viz. attainder, forfeiture and corruption of blood, must be referred to the latter end of this book, when we shall treat of them altogether as well in treason] as for other offences (*h*).

We proceed next to consider certain offences which, though they fall short of treason, are, like it, injurious to the person, prerogative, or government of the sovereign.

II. The offence of *misprision* of treason.

[Misprisions, a term derived from the old French *mespris*, a neglect or contempt, are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but closely bordering thereon: and it is said that a misprision is contained in every treason and felony whatsoever; and, that if the king so please, the offender may be proceeded against for the misprision

(*f*) In Blackstone's time the punishment of treason was still more dreadful; for as the law then stood (in addition to the solemnities which still obtain), the traitor, if a male, was, 1st, to be hanged by the neck, and cut down alive; and 2nd, his entrails were to be taken out and burned while he was yet alive; and if a woman, she was to be drawn to the gallows, and there burned alive (see 4 Bl. Com. p. 92); but the sentence was altered to the form in which it is stated above by 30 Geo. 3, c. 48, s. 1, and 54 Geo. 3, c. 146.

The punishment of treason, according to Sir E. Coke, is warranted by divers examples in Scripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and so of the rest. 3 Inst. 211.

(*g*) 11 Geo. 4 & 1 Will. 4, c. 66; 2 & 3 Will. 4, c. 123; 7 Will. 4 & 1 Vict. c. 84, ss. 1, 2; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*h*) Vide post, c. XXIII.

[only (*i*); and upon the same principle, while the jurisdiction of the Star Chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court merely for a high misdemeanor: as happened in the case of Roger, Earl of Rutland, in the forty-third year of Elizabeth, who was concerned in the Earl of Essex's rebellion (*j*). Misprisions are generally divided] in our books [into two sorts: negative, which consist in the concealment of something which ought to be revealed; and positive, which consists in the commission of something which ought not to be done.] The latter, however, are not denominated in common language as misprisions, but rather as *contempts* or *high misdemeanors* (*k*). Misprision of treason consists [of the bare knowledge and concealment of treason, without any degree of assent thereto, for any assent makes the party a principal traitor: as indeed the concealment, which was construed aiding and abetting, did at the common law; in like manner as the knowledge of a plot against the State, and not revealing it, was a capital crime at Florence and other States of Italy (*l*). But it is now enacted by the statute 1 & 2 P. & M. c. 10, that a bare concealment of treason, shall be only held a misprision.

This concealment becomes criminal if the party apprised of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace (*m*). But if there be any probable circumstances of assent,—as if one goes to a treasonable meeting, knowing beforehand that a conspiracy is intended against the king; or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of, but conceals it:—this is an implied

(*i*) Year Book, 2 Rich. 3, 10; Staundf. P. C. 37; Kel. 71; 1 Hale, P. C. 374; Hawk. P. C. b. 1, c. 20.

(*j*) Hudson, of the Court of Star Chamber, MS. in Mus. Brit.; Collectanea Juridica, vol. ii. p. 1—241.

(*k*) 4 Bl. Com. 121.

(*l*) Guicciard. Hist. b. 3 and 13.

(*m*) 1 Hale, P. C. 372.

[assent in law and makes the concealer guilty of actual treason (*n*).

The punishment of misprision of treason is loss of the profit of lands during life, forfeiture of goods, and imprisonment during life (*o*); which total forfeiture of the goods was originally inflicted while the offence amounted to principal treason, and, of course, included in it a felony by the common law; and, therefore, is no exception to the general rule laid down in a former chapter (*p*), that, wherever an offence is punished by such total forfeiture, it is felony at the common law.]

III. A third offence falling under the denomination of the present chapter, is that of a person who shall wilfully discharge, or point, aim, or present, at the person of the Queen, any gun or other arms, whether containing explosive materials or not; or shall strike at or attempt to throw anything upon the Queen's person; or produce any firearms or other arms, or any explosive or dangerous matter, near her majesty's person;—with intent, in any of these cases, to injure or alarm her, or commit a breach of the peace: and any one so offending is guilty of a high misdemeanor; and is liable to penal servitude for not more than seven or less than three years, or may be imprisoned for not more than three years, and whipped not more than thrice during that period (*q*).

IV. A fourth offence of this nature has also been made the subject of recent legislation. For by 11 & 12 Vict. c. 12, intituled "An Act for the better Security of the Crown "and Government of the United Kingdom," it is enacted, that if any person, after the passing thereof, shall—within the united kingdom, or without,—compass, imagine, invent, devise, or intend to deprive the Queen, her heirs or successors, from the style, honour, or royal name of the

(*n*) Hawk. P. C. b. 1, c. 20, s. 3.

(*o*) 1 Hale, P. C. 374.

(*p*) Vide sup. p. 83.

(*q*) 5 & 6 Vict. c. 51; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

imperial Crown of the united kingdom, or of any of her majesty's dominions and countries; or to levy war against her majesty, her heirs or successors, within any part of the united kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, both houses or either house of parliament, or to move or stir any foreigner or stranger with force to invade the united kingdom, or any other of her majesty's dominions or countries under the obeisance of her majesty, her heirs or successors; and shall express, utter or declare such compassings, imaginations, inventions, devices or intentions, or any of them, by publishing any printing or writing, or by any overt act or deed;—the person so offending shall be guilty of felony: and on conviction he is liable, at the discretion of the court, to be sentenced to penal servitude for life, or for any term not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, as the court shall direct (*r*): provided always, that if the facts alleged in the indictment, or proved on the trial of any person charged with felony under that Act, shall amount in law to treason,—such indictment shall nevertheless not be deemed void, erroneous or defective; nor shall such person be entitled to be acquitted of such felony; but no person tried for the felony, shall afterwards be prosecuted for treason upon the same facts (*s*).

V. A fifth offence of this nature [may be by speaking or writing against the sovereign; cursing or wishing him

(*r*) 11 & 12 Vict. c. 12; 16 & 17 Vict. c 99; 20 & 21 Vict. c. 3.

(*s*) This Act also brought within its provisions the expression, utterance or declaration of any such compassings, imaginations, inventions, devices or intentions as are mentioned in the text, by *open and advised speaking* only; but by sect. 4, prosecutions for such felonies were to be had only within a certain period after the passing of the Act; which period has now expired.

[ill; giving out scandalous stories concerning him,] as asserting falsely that he labours under mental derangement (*t*), [or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has been also held an offence of this species, to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die; these being acts which impliedly encourage rebellion: and for this species of contempt a man may not only be fined and imprisoned, but suffer corporal punishment (*u*).

VI. Under the general title of this chapter we must also advert to *Præmunire;* an offence which forms the subject of many stringent statutes still unrepealed, though long since dormant (*v*); and deserving, from its connection with our political and ecclesiastical history, a more full and particular consideration, than its degree of importance as a matter of practical law might appear to deserve.

The offence of *præmunire* was so called from the words of the writ preparatory to the prosecution thereof: *præmunire* (*x*) *facias A. B.*, cause A. B. to be forewarned that

(*t*) R. *v.* Harvey, 2 B. & C. 257.

(*u*) Hawk. P. C. b. 1, c. 23, s. 3. Blackstone remarks (vol. iv. p. 123), that in the antient German empire, such persons as endeavour to sow sedition and disturb the public tranquillity were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The Emperors Otho the first and Frederick Barbarossa inflicted this punishment on noblemen of the highest rank; and he cites Mod. Un. Hist. xxix. 28, 119.

(*v*) The terrible penalties of a *præmunire* are denounced by a great variety of statutes, yet prosecutions upon a *præmunire* are unheard of in our courts. There is only one instance of such a prosecution in the State Trials; in which case the penalties of a *præmunire* were inflicted upon some persons for refusing to take the oath of allegiance in the reign of Charles the second. Harg. St. Tr. vol. ii. p. 463.—Ch.

(*x*) A barbarous word for *præmoneri. Præmuneo*, in law Latin, is used in all its tenses and participles for

[he appear before us to answer the contempt wherewith he stands charged; which contempt is particularly recited in the preamble to the writ (*y*). It took its original from the exorbitant power claimed and exercised in England by the Pope; which, even in the days of blind zeal, was too heavy for our ancestors to bear.

It may justly be observed, that religious principles,—which, when genuine and pure, have an evident tendency to make their professors better citizens as well as better men,—have, when perverted and erroneous, been usually subversive of civil government; and been made both the cloak and the instrument, of every pernicious design that can be harboured in the heart of man. The unbounded authority that was exercised by the Druids in the west, under the influence of pagan superstition, and the terrible ravages committed by the Saracens in the east, to propagate the religion of Mahomet,—both witness to the truth of that antient universal observation, that, in all ages and in all countries, civil and ecclesiastical tyranny are mutually productive of each other. It is, therefore, the glory of the Church of England, that she inculcates due obedience to lawful authority; and hath been, as her prelates on a trying occasion once expressed it (*z*), in her principles and practice most unquestionably loyal. The clergy of her persuasion, holy in their doctrines, and unblemished in their lives and conversation, are also moderate in their ambition, and entertain just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the Scriptures, so in matters of

præmoneo, or *cito*. (Ducange, Gloss.) Fuller (Cent. xiv. p. 148) suggests that *præmunire* means to fence and fortify the regal power from foreign assault; and this is adopted by D'Aubigné in his Hist. of the Reformation, (vol. v. p. 107,) but the account of the word given by Ducange seems the true one.

(*y*) Old Nat. Brev. 101, edit. 1534.

(*z*) Address to James the second, 1687.

[external polity and of private right they derive all their title from the civil magistrate: they look up to the king as their head, to the parliament as their lawgiver; and pride themselves in nothing more justly than in being true members of the Church, emphatically *by law* established; whereas the notions of ecclesiastical liberty in those who differ from them, as well in one extreme as in the other, (for we here only speak of extremes,) are equally and totally destructive of those ties and obligations by which all society is kept together: equally encroaching on those rights which reason and the original contract of every free state in the universe, have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The dreadful effects of such a religious bigotry, when actuated by erroneous principles, even of the protestant kind, are sufficiently evident from the history of the anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England who murdered their sovereign, and overturned the church and monarchy. But these horrid devastations, the effects of mere madness, or of zeal that was nearly allied to it, though violent and tumultuous, were but of short duration: whereas the progress of papal policy, long actuated by the steady counsels of successive pontiffs, took deeper root; and was at length, in some places with difficulty, in others never yet extirpated. For this we might call to witness the black intrigues of the Jesuits, at one time triumphant over Christendom; but the subject under our present consideration rather leads us to investigate the vast strides which were formerly made in this kingdom by the popish clergy,—how nearly they arrived to effecting their grand design,—some few of the means they made use of for establishing their plan,—and how almost all of them have been defeated or converted to better purposes, by the vigour of our free constitution and the wisdom of successive parliaments.

[The antient British Church, by whomsoever planted, was a stranger to the bishop of Rome and all his pretended authority. But the pagan Saxon invaders, having driven the professors of Christianity to the remotest corners of our island, their own conversion was afterwards effected by Augustin the monk and other missionaries from the court of Rome. This naturally introduced some few of the papal corruptions in point of faith and doctrine: but we read of no civil authority claimed by the Pope in these kingdoms till the æra of the Norman conquest; when the then reigning pontiff, having favoured Duke William in his projected invasion by blessing his host and consecrating his banners, took that opportunity also of establishing his spiritual encroachments; and was even permitted so to do by the policy of the Conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates—prelates who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in riveting the chains of a free-born people.

The most stable foundation of legal and rational government, is a due subordination of rank, and a gradual scale of authority; and tyranny also itself is most surely supported, by a regular increase of despotism arising from the slave to the sultan; with this difference, however, that the measure of obedience in the one is grounded on the principles of society, and is extended no further than reason and necessity will warrant; in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded. More effetually therefore to enslave the consciences and minds of the people the Romish clergy themselves paid the most implicit obedience to their own superiors or prelates: and they, in their turns, were as blindly devoted to the will of the sovereign pontiff; whose decisions they held to be infallible, and his authority coextensive with the Christian

[world. Hence his legates, *à latere*, were introduced into every kingdom in Europe; his bulls and decretal epistles became the rule both of faith and discipline; his judgment was the final resort in all cases of doubt or difficulty; his decrees were enforced by anathemas and spiritual censures; he dethroned even kings that were refractory; and denied to whole kingdoms, when undutiful, the exercise of Christian ordinances, and the benefits of the gospel of God.

But though the being spiritual head of the Church was a thing of great sound, and of greater authority, yet the court of Rome was fully apprized that among the bulk of mankind power cannot be obtained without property; and therefore its attention began very early to be riveted upon every method that promised pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchase of masses to redeem the souls of the deceased. New-fangled offences were created, and indulgences were sold to the wealthy, for liberty to sin without danger.

The canon law took cognizance of crimes, enjoined penances *pro salute animæ*, and commuted that penance for money. Nonresidence and pluralities among the clergy, and marriages among the laity related within the seventh degree, were strictly prohibited by canon: but dispensations were seldom denied to those who could afford to buy them. In short, all the wealth of Christendom was gradually drained by a thousand channels into the coffers of the holy see.

The establishment also of the feudal system in most of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for usurping a similar authority over all the preferments of the Church, which began first in Italy, and gradually spread into England.

The Pope became a feudal lord, and all ordinary patrons were to hold their right of patronage under this universal superior. Estates held by feudal tenure, being originally

[gratuitous donations, were at that time denominated *beneficia;* their very name as well as constitution was borrowed, and the care of the souls of a parish thence came to be denominated a *benefice* (*a*). Lay fees were conferred by investiture or delivery of corporal possession; and spiritual benefices, which at first were universally donative, now received in like manner a spiritual investiture by institution from the bishop, and induction under his authority. As lands escheated to the lord in defect of a legal tenant, so benefices lapsed to the bishop, upon nonpresentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy, were equivalent to the feudal render, or rent, reserved upon a grant: the oath of canonical obedience was copied from the oath of fealty required from the vassal by his superior: the *primer seisins* of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy: and the occasional aids and talliages levied by the prince on his vassals, gave a handle to the Pope to levy, by the means of his legates *à latere*, Peter-pence and other exactions.

At length the holy father went a step beyond any example, of either emperor or feudal lord: he reserved to himself, by his own apostolical authority (*b*), the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither or back again; and, moreover, such also as became vacant by his promotion to a bishopric or abbey, "*etiamsi ad illa personæ consueverint et debuerint per electionem, aut quemvis alium modum, assumi.*" And this last, the canonists declared, was no detriment at all to the patron, being only like the change of a life in a feudal estate by the lord.

(*a*) Vide sup. vol. I. p. 174. (*b*) Extrav. l. 3, t. 2, c. 13.

[Dispensations to avoid these vacancies begat the doctrine of *commendams* (*c*); and papal *provisions* were the previous nomination to such benefices before they became actually void, though afterwards indiscriminately applied to any right of patronage exerted or usurped by the Pope. In consequence of which the best livings were filled by Italian and other foreign clergy; equally unskilled in, and adverse to, the laws and constitutions of England. The very nomination to bishoprics,—that antient prerogative of the Crown,—was wrested from King Henry the first, and afterwards from his successor King John, and seemingly indeed conferred on the chapters belonging to each see; but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vested in the Pope. And to sum up this head with a transaction most unparalleled and astonishing in its kind, Pope Innocent the third had at length the effrontery to demand, and King John had the meanness to consent to, a resignation of his crown to the Pope, whereby England was to become for ever St. Peter's patrimony; and the dastardly monarch re-accepted his sceptre from the hands of the papal legate, to hold as the vassal of the holy see, at the annual rent of a thousand marks.

Another engine set on foot, or at least greatly improved by the court of Rome, was a masterpiece of papal policy. Not content with the ample provision of tithes which the law of the land had given to the parochial clergy, they endeavoured to grasp at the lands and inheritances of the kingdom; and had not the legislature withstood them, would by this time probably have been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine, and other rules; men of sour and austere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating

(*c*) Vide sup. vol. III. p. 37.

[the minds of the people by pretences to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior the Pope. And as in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe that founding a monastery a little before their deaths would atone for a life of incontinence, disorder and bloodshed. Hence innumerable abbeys and religious houses were built within a century after the Conquest, and endowed not only with the tithes of parishes, (which were ravished from the secular clergy,) but also with lands, manors, lordships, and extensive baronies. And the doctrine inculcated was, that whatever was so given to, or purchased by, the monks and friars, was consecrated to God himself; and that to alienate or take it away was no less than the sin of sacrilege.

We might here have enlarged upon other contrivances set on foot by the court of Rome, for effecting an entire exemption of its clergy from any intercourse with the civil magistrate; such as the separation of the ecclesiastical court from the temporal; the appointment of its judges by merely spiritual authority, without any interposition from the Crown; the exclusive jurisdiction it claimed over all ecclesiastical persons and causes (*d*); and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or punishment except before their own tribunal (*e*): but we shall only observe, at present, that notwithstanding this plan of pontifical power was so deeply laid, and was so indefatigably pursued by the unwearied politics of the court of Rome through a long succession of ages; notwithstanding it was polished and improved by the united endeavours of a body of men who engrossed all the learning of Europe, for centuries together; notwithstanding

(*d*) As to the history and progress of the ecclesiastical courts, vide sup. vol. III. bk. v. c. v.

(*e*) As to the benefit of clergy, vide post, c. XXIII.

[it was firmly and resolutely executed by persons the best calculated for establishing tyranny and despotism,—being fired with a bigoted enthusiasm which prevailed not only among the weak and simple, but even among those of the best natural and acquired endowments; and being unconnected with their fellow subjects, and totally indifferent what might befal that posterity to which they bore no endearing relation; yet it vanished into nothing when the eyes of the people were a little enlightened, and they set themselves with vigour to oppose it. So vain and ridiculous is the attempt to live in society, without acknowledging the obligations which it lays us under: and to effect an entire independence of that civil state, which protects us in all our rights; and gives us every other liberty, that only excepted of despising the laws of the community.

Having thus in some degree endeavoured to trace out the original and subsequent progress of the papal usurpation, let us now return to the statutes of *præmunire;* which were framed to encounter this overgrown, yet increasing evil. King Edward the first, a wise and magnanimous prince, set himself in earnest to shake off this servile yoke (*f*). He would not suffer his bishops to attend a general council, until they had sworn not to receive the papal benediction. He made light of all papal bulls and processes; attacking Scotland in defiance of one; and seizing the temporalities of his clergy, who, under pretence of another, refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain; thereby closing the great gulph, in which all the lands of the kingdom were in danger of being swallowed. And one of his subjects having obtained a bill of excommunication against another, he ordered him to be executed as a traitor, according to the antient law (*g*). And in the thirty-fifth year of his reign, was made the first statute against papal provisions:

(*f*) Dav. 83, &c.

(*g*) Bro. Abr. tit. Coronæ, 115; Treason, 14; 5 Rep. part 1, fol. 12; 3 Ass. 19.

[being, according to Sir Edward Coke (*h*), the foundation of all the subsequent statutes of *præmunire;* which we rank as an offence immediately against the sovereign, because every encouragement of the papal power is a diminution of the authority of the Crown.

In the weak reign of Edward the second, the Pope again endeavoured to encroach, but the parliament manfully withstood him; and it was one of the principal articles charged against that unhappy prince, that he had given allowance to the bulls of the see of Rome. But Edward the third was of a temper extremely different: and to remedy these inconveniences first by gentle means, he and his nobility wrote an expostulation to the Pope; but receiving a menacing and contemptuous answer,—withal acquainting him that the Emperor, who, a few years before, at the Diet of Nuremburg, A.D. 1323, had established a law against provisions (*i*), and also the king of France, had lately submitted to the holy see;—the king replied, that if both the Emperor and the French king should take the Pope's part, he was ready to give battle to them both in defence of the liberties of the Crown. Hereupon more sharp and penal laws were devised against provisoes (*k*); which enact, severally, that the court of Rome shall not present or collate to any bishopric or living in England: and that whoever disturbs any patron in the presentation to a living, by virtue of a papal provision, such provisor shall pay fine and ransom to the king at his will, and be imprisoned till he renounces such provision; and the same punishment is inflicted on such as cite the king, or any of his subjects, to answer in the court of Rome. And when the holy see resented these proceedings, and Pope Urban the fifth attempted to revive the vassalage and annual rent to which King John had subjected the kingdom, it was unanimously agreed by all the estates of the realm, in parliament as-

(*h*) 2 Inst. 583.

(*i*) Mod. Un. Hist. xxix. 293.

(*k*) Stat. 25 Edw. 3, st. 6; 27 Edw. 3, st. 1, c. 3; 38 Edw. 3, st. 1, c. 4; and st. 2, cc. 1, 2, 3, 4.

[sembled, in the fortieth year of Edward the third, that King John's donation was null and void; being without the concurrence of parliament, and contrary to his coronation oath; and all the temporal nobility and commons engaged, that if the Pope should endeavour, by process or otherwise, to maintain these usurpations, they would resist and withstand him to the utmost of their power (*l*).

In the reign of Richard the second, it was found necessary to sharpen and strengthen these laws; and therefore it was enacted by statutes 3 Ric. II. c. 3, and 7 Ric. II. c. 12, first, that no alien should be capable of letting his benefice to farm,—in order to compel such as had crept in, at least to reside on their preferments; and afterwards that no alien should be capable of being presented to any ecclesiastical preferment, under the penalties of the statutes of provisors (*m*). By the statute 12 Ric. II. c. 15, all liege men of the king accepting of a living by any foreign provision, are put out of the king's protection, and the benefice made void. To which the statute 13 Ric. II. st. 2, c. 2, adds banishment and forfeiture of lands and goods; and by the third chapter of the same statute, any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

In the writ for the execution of all these statutes, the words *præmunire facias* being, (as we said,) used to demand a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of *præmunire:* and accordingly the next statute we shall mention,—which is generally referred to by all subsequent statutes,—is usually called the Statute of *Præmunire.* It is the statute 16 Ric. II. c. 5; which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things

(*l*) Seld. in Flet. 10, 4.

(*m*) Vide sup. vol. III. p. 28.

[which touch the king, against him, his Crown and realm; and all persons aiding and assisting therein; shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council; or process of *præmunire facias* shall be made out against them, as in other cases of provisors.

By the statute 2 Hen. IV. c. 3, all persons who accept any provision from the Pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *præmunire*. And this is the last of our antient statutes touching this offence; the usurped civil power of the bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards; the spirit of the nation being so much raised against foreigners, that about this time, in the reign of Henry the fifth, the alien priories or abbeys for foreign monks were suppressed, and their lands given to the Crown.] And even prior to the Reformation, all further attempts on the part of our own ecclesiastics to support these foreign jurisdictions had ceased.

[A learned writer before referred to, is therefore greatly mistaken, when he says (*n*), that in the time of Henry the sixth, the archbishop of Canterbury and other bishops offered to the king a large supply, if he would consent that all laws against provisors, and especially the statute of 16 Ric. II., might be repealed; but that this motion was rejected. This account is incorrect in all its branches. For, first, the application which he probably means, was made not by the bishops only, but by the unanimous consent of a provincial synod, assembled in 1439, in the eighteenth year of Henry the sixth; that very synod, which at the same time refused to confirm and allow a papal bull, which was then laid before them. Next, the purport of it was not to procure a repeal of the statutes against provisors, or that of Richard the second in particular; but to request

(*n*) Dav. 96.

[that the penalties thereof,—which were applied by a forced construction to all that sued in the spiritual, and even in many temporal courts of this realm,—might be turned against the proper objects only, those who appealed to Rome, or to any foreign jurisdictions; the tenor of the petition being, "that those penalties should be taken to "extend only to those that commenced any suits, or pro-"cured any writs or public instruments at Rome, or else-"where out of England; and that no one should be "prosecuted upon that statute for any suit in the spiritual "courts, or lay jurisdictions of this kingdom." Lastly, the motion was so far from being rejected, that the king promised to recommend it to the next parliament; and, in the mean time, that no one should be molested upon this account. And the clergy were so satisfied with their success, that they granted to the king a whole tenth upon this occasion (*o*).

And, indeed, so far was the archbishop, who presided in this synod, from countenancing the usurped power of the Pope in this realm, that he was ever a firm opposer of it. And, particularly, in the reign of Henry the fifth, he prevented the king's uncle from being then made a cardinal, and legate *à latere* from the Pope; upon the mere principle of its being within the mischief of papal provisions, and derogatory from the liberties of the English Church and nation. For, as he expressed himself to the king in his letter upon the subject, "he was bound to oppose it by "his ligeance, and also to quit himself to God, and the "church of this land, of which God and the king had "made him the governor." This was not the language of a prelate addicted to the slavery of the see of Rome; but of one who was indeed of principles so very opposite to the papal usurpations, that in the year preceding this synod, the seventeenth year of Henry the sixth, he refused to consecrate a bishop of Ely that was nominated by Pope Eugenius the fourth,—a conduct quite consonant

(o) Wilk. Concil. Mag. Brit. iii. 533.

[to his former behaviour in the sixth year of Henry the sixth, when he refused to obey the commands of Pope Martin the fifth, who had required him to exert his endeavours to repeal the statute of *præmunire; "illud execrabile statutum,"* as the holy father phrases it; which refusal so far exasperated the court of Rome against him, that at length the Pope issued a bull to suspend him from his office and authority, which the archbishop disregarded, and appealed to a general council. And so sensible were the nation of their primate's merit, that the lords spiritual and temporal, and also the University of Oxford, wrote letters to the Pope in his defence; and the house of commons addressed the king to send an ambassador forthwith to his holiness, on behalf of the archbishop, who had incurred the displeasure of the Pope for opposing the excessive power of the court of Rome (*p*).

This then, is the original meaning of the offence which we call *præmunire*, viz., introducing a foreign power into this land; and creating *imperium in imperio,* by paying that obedience to papal process which constitutionally belonged to the king alone, long before the Reformation in the reign of Henry the eighth: at which time the penalties of *præmunire* were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of Rome, though not all the corrupted doctrines of the Romish Church. And, therefore, by the several statutes of 24 Hen. VIII. c. 12, and 25 Hen. VIII. cc. 19 and 21, to appeal to Rome from any of the king's courts, (which, though illegal before, had at times been connived at,) to sue to Rome for any licence or dispensation; or to obey any process from thence;—are made liable to the pains of *præmunire*. And in order to restore to the king in effect the nomination of vacant bishoprics, and yet keep up the established forms, - it is enacted by statute 25 Hen. VIII. c. 20, that if the dean and chapter refuse to elect

(*p*) See Wilk. Concil. Magn. Br. vol. iii. *passim*, and Dr. Duck's Life of Archbishop Chichele.

[the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *præmunire* (q).]

So also by statute 13 Eliz. c. 2, if any person imported any *agnus Dei*, crosses, beads, or other superstitious things pretended to be hallowed by the Bishop of Rome, and tendered the same to be used, or received the same with such intent, and did not discover the offender; or if a justice of the peace, knowing thereof, did not within fourteen days declare it to a privy councillor;—they all formerly incurred a *præmunire*. But the penalties imposed by this Act are now recently repealed, by the statute 9 & 10 Vict. c. 59 (r).

[Thus far the penalties of *præmunire* seem to have kept within the proper bounds of their original institution, the depressing the power of the Pope; but they being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offences; some of which bear more and some less relation to this original offence, and some no relation at all.

Thus, 1. By the statute 1 & 2 Ph. & M. c. 8, to molest the possessors of abbey lands granted by parliament to Henry VIII. and Edward VI., is a *præmunire*. 2. To obtain any stay of proceedings, (other than by arrest of judgment or writ of error,) in any suit for a monopoly, is likewise a *præmunire* by statute 21 Jac. I. c. 3 (s).] 3. To attempt to restrain the importation or making of gunpowder, is also a *præmunire* by 16 Car. I. c. 21 (t). 4. On the abolition, by statute 12 Car. II. c. 24, of purvey-

(q) Vide sup. vol. III. p. 9.

(r) By 11 & 12 Vict. c. 108, reciting that doubts existed whether her Majesty could lawfully establish diplomatic relations and intercourse with the sovereign of the Roman states,—it was declared and enacted, that such relations and intercourse should be lawful; but with a proviso prohibitory of the reception at the Court of London of any diplomatic agent from Rome who shall be in holy orders in the Church of Rome, or a Jesuit, or member of any order of the Church of Rome bound by monastic or religious vows.

(s) Vide sup. vol. II. p. 25.

(t) Blackstone also cites the act against the importation of gunpowder, 1 Jac. 2, c. 8: but this last was repealed by 6 Geo. 4, c. 105.

ance (*u*), and the prerogative of pre-emption,—or taking any victual, beasts or goods for the king's use at a stated price without the consent of the proprietor,—the exertion of any such power for the future was declared to be indictable; and in any suit thereon, to obtain any stay of proceedings other than by arrest of judgment, or writ of error, is made a *præmunire*. 5. [To assert, maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *præmunire* by statute 13 Car. II. c. 1 (*x*). 6. By the Habeas Corpus Act also, 31 Car. II. c. 2, it is a *præmunire*, and incapable of the king's pardon, besides other heavy penalties, to send any subject of this realm a prisoner,] subject to certain exceptions in the act specified, [into parts beyond the seas. 7. By statute 7 & 8 Will. III. c. 24, serjeants, counsellors, proctors, attornies, and all officers of courts practising without having taken the] proper oaths are guilty of a *præmunire*. 8. [By the statute 6 Ann. c. 7, to assert maliciously and directly, by preaching, teaching or advised speaking, that any person, other than according to the Acts of Settlement and Union, hath any right to the throne of these kingdoms, or that the king and parliament cannot make laws to limit the descent of the Crown,—such preaching, teaching, or advised speaking is a *præmunire*, as writing, printing or publishing the same doctrines amounted, we may remember, to treason (*y*). 9. By statute 6 Ann. c. 23, if the assembly of peers of Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *præmunire*. 10. The statute 12 Geo. III. c. 11, subjects to the penalties of the statute of *præmunire*, all such as knowingly, and wilfully, solemnize, assist, or are present, at any forbidden marriage of such of the descendants of the body of King George the second, as are, by that

(*u*) Vide sup. vol. II. p. 544.

(*x*) Vide sup. vol. II. p. 342.

(*y*) Vide sup. p. 231.

[Act, prohibited to contract matrimony without the consent of the Crown (*z*).

Having thus inquired into the nature and several species of *præmunire*, its punishment may be gathered from the foregoing statutes, which are thus shortly summed up by Sir Edward Coke (*a*), "That from the conviction the defendant shall be out of the king's protection, and his "lands and tenements, goods and chattels, forfeited to the "king; and that his body shall remain in prison *at the* "*king's pleasure;* or, as other authorities have it, *during* "*life*" (*b*): both which amount to the same thing, as the king by his prerogative may any time remit the whole or any part of the punishment; except in the case of transgressing the statute of *habeas corpus*.

These forfeitures here inflicted, do not bring this offence within our former definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, Sir Edward Coke adds, was this offence of *præmunire*, that a man that was attainted of the same might have been slain by any other man without danger of law; because it was provided by law that any man might do to him as to the king's enemy, and any man may lawfully kill an enemy (*c*). However, the position itself that it is at any time lawful to kill an enemy, is by no means tenable; it is only lawful by the law of nature and nations to kill him in the heat of battle, or for necessary self-defence.

(*z*) Besides the instances of offences subject to the penalties of a *præmunire* mentioned in the text, three others are enumerated by Blackstone, viz. 1. The offence under 13 Eliz. c. 8, of acting as a broker or agent, in any usurious contract where above ten per cent. is taken. 2. The offence under 1 W. & M. st. 1, c. 8, of refusing, (where the party is eighteen years of age,) to take, upon proper tender, the oaths of allegiance and supremacy. 3. The offence under 6 Geo. 1, c. 18, (commonly called the Bubble Act,) of undertaking unwarrantable projects by unlawful subscriptions. But the law on these subjects is now altered. See as to the first, sup. vol. II p. 95; as to the second, 31 Geo. 3, c. 32, s. 18; 7 & 8 Vict. c. 102; as to the third, 6 Geo. 4, c. 91.

(*a*) 1 Inst. 129.

(*b*) 1 Bulst. 199.

(*c*) Stat. 25 Edw. 3, st. 5, c. 22.

[And to obviate such savage or mistaken notions (*d*), the statute 5 Eliz. c. 1, provides, that it shall not be lawful to kill any person attainted in a *præmunire;* any law, statute, opinion, or exposition of law, to the contrary notwithstanding. But still such delinquent, though protected, as a part of the public, from public wrongs, can bring no action for any private injury, how atrocious soever; being so far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may suffer. And no man knowing him to be guilty, can with safety give him comfort, aid or relief (*e*).]

VII. [*Contempts against the sovereign's title*, not amounting to treason or *præmunire*, are chiefly the denial of his right to the Crown, in common and unadvised discourse; for if it be by advisedly speaking, we have seen that it amounts to *præmunire* (*f*). This heedless species of contempt is punished by our law with fine and imprisonment.]

VIII. *Contempts against the Crown's ecclesiastical supremacy;* of which we have had an example in the strange attempt lately made by the see of Rome to establish a hierarchy of its own within this realm, with titles invasive of the rights of our protestant dignitaries. Our law, however, has made provision against all contempts of this description. For, first, it is enacted by 10 Geo. IV. c. 7, s. 24, that if any person, other than the person authorized by law, shall assume or use the title of archbishop of any province, bishop of any bishopric, or dean of any deanery, in England or Ireland,—he shall forfeit for every such offence 100*l*. And by 14 & 15 Vict. c. 60, a like penalty is imposed upon any person who shall procure from the see of Rome, or publish or put in use within the united kingdom, any bull for constituting archbishops or bishops of

(*d*) Bro. Abr. tit. Coronæ, 197.
(*e*) Hawk. P. C. b. 1, c. 19, s. 47.
(*f*) Vide sup. p. 253.

pretended provinces or sees; or upon any person other than the person authorized by law, who shall assume or use the title of archbishop, bishòp or dean of any city, town, place, or territory in the united kingdom,—whether it be the city, town, place, or territory of any province, see, or deanery of the united kingdom or not.

IX. *Contempts against the royal palaces* [have been always looked upon as high misprisions; and by the antient law before the Conquest, fighting in the king's palace or before the king's judges was punished with death (*g*). So, too, in the old Gothic constitution, there were many places privileged by law—"*quibus major reverentia et securitas debetur, ut templa et judicia, quæ sancta habebantur, arces et aula regis, denique locus quilibet præsente aut adventante rege* (*h*)."] And with us, by the statute 33 Hen. VIII. c. 12, malicious striking in the king's palace wherein his royal person resides, whereby blood is drawn, was punishable by perpetual imprisonment and fine at the king's pleasure, and also with the loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length (*i*); but by 9 Geo. IV. c. 31, s. 1, this punishment is repealed. It appears, however, to be a contempt of the kind now in question to execute the ordinary process of the law, by arrest or otherwise, within the verge of a royal palace, or in the Tower; unless permission be first obtained, from the proper authority (*k*).

X. *The maladministration of such high officers as are in public trust and employment;* is ranked by Blackstone among contempts against the sovereign or his government.

(*g*) 3 Inst. 140; LL. Alured. cap. 7 and 34.

(*h*) Stiernh. de Jure Goth. l. 3, c. 3.

(*i*) See Knevet's case, 1C Harg. St. Tr. 16.

(*k*) See Elderton's case, Ld. Raym. 978; R. *v.* Stobbs, 3 T. R. 735; Winter *v.* Miles, 1 Camp. 475; S. C. 10 East, 578; Sparks *v.* Spink, 7 Taunt. 311; Batson *v.* M'Lean, 2 Chit. Rep. 51; Bell *v.* Jacobs, 1 M. & P. 309.

[This is usually punished by the method of parliamentary impeachment; wherein such penalties short of death are inflicted, as to the wisdom of the house of Lords shall seem proper; consisting usually of banishment, imprisonment, fines or perpetual disability. Hitherto also may be referred the offence of *embezzling of public money*, called among the Romans *peculatus*; which the Julian law punished with death in a magistrate, and with deportation or banishment in a private person (*l*). With us it is not a capital crime; but subjects the committer of it to a discretionary fine and imprisonment,] at common law. And now by 50 Geo. III. c. 59, s. 2, it is provided, that if any officer entrusted with the receipt or management of the public revenues, shall knowingly furnish false statements or returns of the monies collected by him, or the balances left in his hands, he shall be guilty of a misdemeanor; and be fined and imprisoned at the discretion of the court, and for ever rendered incapable of holding any office under the Crown. And by 2 Will. IV. c. 4 (*m*), if any person in the public service, and entrusted, by virtue of such employment, with the receipt, custody, management or control of any chattel, money or valuable security (*n*),—shall embezzle the same or any part thereof; or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or any purpose whatever, except the public service;—he shall be deemed to have stolen the same, and be guilty of felony: and he is liable to penal servitude for any term not more than fourteen years, nor less than three years; or to be imprisoned, with or without hard labour, for any term not exceeding three years (*o*).

XI. To the same class must be referred the offence of

(*l*) Inst. 4, 18, 9.

(*m*) This statute repeals a similar provision contained in the first section of 50 Geo. 3, c. 59.

(*n*) See the definition of a valuable security, within the meaning of the Act, 2 Will. 4, c. 4, s. 2.

(*o*) 2 Will. 4, c. 4; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

selling public offices; as to which it is provided by 5 & 6 Edw. VI. c. 16 (*p*), (confirmed and extended by 49 Geo. III. c. 126,) that persons buying or selling, or receiving or paying money or reward for, any office in the gift of the Crown, (with certain exceptions); and persons receiving or paying money for, or soliciting or obtaining, any such office, or making any negotiation or pretended negotiation relating thereto; and persons opening or advertising houses for transacting business relating to the sale of any such office;—shall, respectively, be deemed guilty of a misdemeanor (*q*).

XII. *Offences relating to the coin.*

And, first, of offences relating to the coin *of this realm.* Almost the whole of these, are now comprised in the stat. 2 Will. IV. c. 34 (intituled "An Act for consolidating and amending the Laws against Offences relating to the Coin"); which repeals a great variety of statutes once encumbering our criminal code, and substitutes in lieu thereof the following enactments (*r*):

With respect to gold and silver coin.

1. If any person shall falsely make or counterfeit any coin, resembling, or apparently intended to resemble or pass for, any of the current gold or silver coin (whether the coin be or be not in a perfect state),—he shall be guilty of felony (*s*).

2. If any person shall gild or silver, (or colour with any wash or materials capable of producing the colour of gold or silver,) any coin, resembling or intended to pass for any current gold or silver coin,—or any piece of silver or copper,

(*p*) As to this statute, see Hopkins *v.* Prescott, 4 C. B. 578; Sterry *v.* Clifton, 9 C. B. 110.

(*q*) See also 6 Geo. 4, cc. 82 and 83, by which the sale of offices in the Queen's Bench and Common Pleas are prohibited; and see 17 & 18 Vict. c. 102, as to election *bribery,* by gift of any office.

(*r*) By 16 & 17 Vict. c. 48, the 2 Will. 4, c. 34, has been extended to those colonies in which local provisions as to these offences have not been made.

(*s*) 2 Will. 4, c. 34, s. 3.

or of coarse gold or silver, or of any metal or mixture of metals (of a fit size and figure to be coined),—with intent that the same shall be coined into false coin, resembling, or intended to pass for, any current gold or silver coin; or shall gild, silver, or colour any of the current silver coin or copper coin (or file or alter such silver or copper coin),—with intent to make the same resemble or pass for any of the current gold coin, or gold and silver coin,—he shall, in either case, be guilty of felony (*t*).

3. If any person shall buy, sell, receive, pay, or put off any false gold or silver coin, at a lower rate than the same by its denomination imports; or if any person shall import into the united kingdom any such false coin, knowing the same to be counterfeit; he shall, in either case, be guilty of felony (*u*).

4. If any person shall knowingly and without lawful authority, (the proof of which authority shall lie on the party accused,) make or mend, or buy or sell or have in his possession, or shall convey out of the Royal Mints, any coining moulds or tools,—or shall convey out of such Mints any coin, bullion, or metal,—he shall, in any of such cases, be guilty of felony (*v*).

The punishment for any of the above cases of felony is penal servitude for life, or for any term not less than three years; or imprisonment (*w*) for any term not more than four years, at the discretion of the court (*x*).

5. If any person shall impair, diminish, or lighten any of the current gold or silver coin, with intent to make the

(*t*) 2 Will. 4, c. 34, s. 4. See R. *v.* Turner, 2 M. C. C. R. 42.

(*u*) 2 Will. 4, c. 34, s. 6. See R. *v.* Joyce, Car. C. L. 184.

(*v*) 2 Will. 4, c. 34, ss. 10, 11. See R. *v.* Foster, 7 Car. & P. 495; R. *v.* Bannen, 1 Car. & Kir. 295.

(*w*) In any case in which by this Act imprisonment may be inflicted, it may be with or without hard labour, and with or without solitary confinement, at the discretion of the court. (Sect. 19.)

(*x*) 2 Will. 4, c. 34, ss. 4, 6, 10, 11; 7 Will. 4 & 1 Vict. c. 91; 16 & 17 Vict. c. 99; 20 & 21 Vict c. 3. Until the passing of 2 Will. 4, c. 34, many offences connected with counterfeiting coin were capital.

coin so altered pass for the current gold or silver coin, he shall be guilty of felony; and is liable to penal servitude for any term not less than three years, or more than fourteen years, or may be imprisoned for any term not more than three years (*y*).

6. If any person shall tender, utter, or put off any false or counterfeit gold or silver coin, knowing the same to be counterfeit, he shall be guilty of a misdemeanor; and may be imprisoned for any term not exceeding one year (*z*): and if at the time of such uttering he have in his possession any other such counterfeit coin; or shall either on the day of such uttering, or within ten days afterwards, utter any more such false coins (knowing the same to be false);—he may be imprisoned for any term not exceeding two years: and if any person shall have in his possession three or more pieces of counterfeit coin, knowing the same to be counterfeit, and with intent to utter the same, he may be imprisoned for any term not more than three years (*a*); and upon a second conviction for any of these offences, he shall be deemed guilty of felony, and punished by penal servitude for life, or not less than three years, or by imprisonment for not more than four years (*b*).

With respect to copper coin.

1. If any person shall falsely make or counterfeit any coin resembling any of the current copper coin; or shall (without lawful authority or excuse,) make or mend, or begin to make or mend, buy or sell, or have in his posses-

(*y*) 2 Will. 4, c. 34, s. 6; 7 Will. 4 & 1 Vict. c. 91; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*z*) 2 Will. 4, c. 34, s. 7. See R. *v*. Jones, 9 Car. & P. 761; R. *v*. Page, 7 Car. & P. 122; R. *v*. Hayes, 2 Cox's Cr. C. 68; R. *v*. West, ibid. 237; Queen *v*. Welch, 20 L. J. (M. C.) 101.

(*a*) 2 Will. 4, c. 34, s. 8. As to the offence of uttering, &c. counterfeit coin, see R. *v*. Heath, R. & R. C. C. 184; R. *v*. Stewart, ibid. 288; R. *v*. Williams, 1 Car. & M. 259; R. *v*. Hurse, 2 M. & R. 360; R. *v*. Rogers, 2 Moo. C. C. 85; R. *v*. Foster, 1 Dearsley's C. C. R. 456; Jarvis's case, ibid. 552.

(*b*) 2 Will. 4, c. 34, ss. 4, 6, 7, 10, 11; 7 Will. 4 & 1 Vict. c. 91; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

sion, any tool or engine adapted for counterfeiting the current copper coin; or shall buy, receive, pay, or put off any false coin resembling any of the current copper coin, at a lower rate than its denomination imports;—he shall, in any of these cases, be guilty of felony; and may be sentenced to penal servitude for any term not more than seven or less than three years, or be imprisoned for any term not more than two years (*c*).

2. If any person shall utter any false coin intended to pass for any current copper coin; or shall have in his possession three or more pieces of false copper coin, knowing the same to be counterfeit, and with intent to utter the same,—he shall be guilty of a misdemeanor, and may be imprisoned for any term not exceeding one year (*d*).

In addition to the above provisions, it has been recently provided by 16 & 17 Vict. c. 102, with respect to *any* of the current coin of the realm, that it shall be a misdemeanor, punishable by fine or imprisonment at the discretion of the court, for any person to deface the same by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened; or to use any machine or instrument for the purpose of bending the same: and it is declared that coin, so defaced or stamped, shall not be a legal tender; and that any person tendering or uttering it may be summarily convicted before two justices, and fined forty shillings (*e*).

Secondly, of offences relating to the *coin of foreign states*. By 37 Geo. III. c. 126, ss. 2, 3 (*f*), if any person shall

(*c*) 2 Will. 4, c. 34, s. 12; 7 Will. 4 & 1 Vict. c. 91; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*d*) 2 Will. 4, c. 34, s. 12.

(*e*) It was formerly an offence to melt down the current gold and silver coin of the realm; to receive or pay for current gold coin for more or less value than its denomination imported; and to import into this country silver coin below the standard weight: but the statutes that constituted these offences were repealed by 59 Geo. 3, c. 49, s. 11; 6 Geo. 4, c. 105, s. 141; and 2 Will. 4, c. 34.

(*f*) As to these provisions, see Reg. *v.* Roberts, 1 Dearsley's C. C. R. 539.

coin or counterfeit any kind of coin not the proper coin of this realm, nor permitted to be current within the same, but intended to resemble or pass for foreign gold or silver coin; or shall bring into this realm any such false coin, knowing the same to be counterfeit, to the intent to utter the same within this realm or its dominions;—he shall be guilty of felony: and he may be sentenced to penal servitude for any term not more than seven or less than three years (*g*): and it is further enacted, that if any person shall utter or tender in payment, or exchange, any such counterfeit coin, knowing the same to be false, he shall for the first offence be imprisoned for six months, and find sureties for six more; for the second offence be imprisoned for two years, and find sureties for two years more; and for the third offence may be sentenced to penal servitude for life, or not less than three years, or imprisoned for not more than four or less than two years (*h*).

By 43 Geo. III. c. 139, if any person shall counterfeit any foreign coin, with intent to resemble any copper or other coin made of metals or mixed metals of less value than silver,—he shall be guilty of a misdemeanor and breach of the peace; and be imprisoned for the first offence for any time not exceeding one year: and on a second conviction, he is liable to penal servitude for not more than seven or less than three years (*i*). And any persons who shall have in their possession more than five pieces of false foreign coin (without lawful excuse), may on the oath of one witness before a magistrate, be convicted in the penalty of not more than forty shillings, or less than ten shillings; and in default thereof be committed to the house of correction for three months, or till the fine be paid; and they forfeit the base money (*j*).

(*g*) 37 Geo. 3, c. 126, ss. 2, 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*h*) 37 Geo. 3, c. 126, s. 4; 11 Geo. 4 & 1 Will. 4, c. 66; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. The *third* offence of uttering coin, &c., under this section was formerly visited with death; but by 11 Geo. 4 & 1 Will. 4, c. 66, the capital punishment was repealed.

(*i*) 43 Geo. 3, c. 139; 16 & 17 Vict. c. 99, s. 6.

(*j*) 43 Geo. 3, c. 139, s. 6. There is also the statute of 38 Geo.

XIII. The offence of *embezzling* or *destroying* the royal stores or ships of war.

It is provided that any person who shall steal or embezzle ammunition, sails, cordage, or naval and military stores belonging to the Crown, or shall abet any person in so doing;—shall be liable to penal servitude for life, or any term not less than three years; or to be imprisoned, with or without hard labour, for any term not more than seven years (*k*).

Again, any person, without lawful authority, (the proof whereof shall lie on the party accused,) who shall sell or have in his possession any goods marked with the *broad arrow*, or other royal mark; and every person who conceals the same, or defaces the royal marks upon such goods;—shall be punishable with penal servitude for fourteen years, or with corporal punishment, fine, or imprisonment, at the discretion of the court (*l*).

And to set on fire, burn, or destroy, any of H. B. M.'s ships of war,—whether built, building, or repairing;—or any of the arsenals, magazines, dockyards, rope yards or victualling offices of the Crown; or materials thereto belonging; or any military, naval or victualling stores or am-

3, c. 67, which prohibits the exportation of all copper coin whatever, except the legal current copper coin of this realm; and all counterfeit gold and silver coin intended to resemble the current coin of this realm, or that of any foreign state; to any of the British Colonies in America or the West Indies,—under the penalty of forfeiture, and in some cases of imprisonment.

(*k*) 4 Geo. 4, c. 53; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. See also 9 Geo. 3, c. 30, s. 5, as to the apprehension of such offenders; and see the Annual Mutiny Act, (sup. vol. II. p. 596,) and the Acts for regulating the Royal Navy, (sup. vol. II. p. 602,) as to the offence of embezzling stores, &c., by officers, &c.

(*l*) 39 & 40 Geo. 3, c. 89; 55 Geo. 3, c. 127; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. (See R. *v.* Bridges, 8 East, 53; R. *v.* Silversides, 3 Q. B. 406.) As to the embezzlement of stores, &c., see 9 & 10 Will. 3, c. 41; 1 Geo. 1, st. 2, c. 25; 9 Geo. 1, c. 8; 17 Geo. 2, c. 40; 52 Geo. 3, c. 12; 54 Geo. 3, cc. 60, 159; 55 Geo. 3, c. 127; 56 Geo. 3, c. 80; 1 & 2 Geo. 4, c. 75. As to royal marks, see 9 & 10 Will. 3, c. 41; 54 Geo. 3, c. 60; 55 Geo. 3, c. 127.

munition: or to cause, aid, procure, abet, or assist in any of such offences,—is felony punishable with death (*m*).

XIV. The offence of *serving foreign states*, [which service is generally inconsistent with allegiance to one's natural prince,] is restrained and punished [by statute 3 Jac. I. c. 4, s. 18; which makes it felony for any person whatever to go out of the realm to serve any foreign prince, without having first taken the oath of allegiance before his departure. And it is,] by that statute, [felony also for any gentleman or person of higher degree, or for one who hath borne any office in the army, to go out of the realm to serve such foreign prince or state, without previously entering into a bond with two sureties not to enter into any conspiracy against his natural sovereign (*n*).] And by 59 Geo. III. c. 69, generally known by the name of the "Foreign Enlistment Act" (*o*), if any natural-born subject of Great Britain (without licence obtained under the royal sign manual, or by order in council or by proclamation) shall accept any military commission (*p*); or enlist as a soldier or a sailor in any foreign service; or shall go to any foreign country with an intent so to enlist; or shall endeavour to procure any other person so to enlist;—he shall, in any of the above cases, be guilty of a misdemeanor, and may be punished with fine or imprisonment, or both: and if any person within the realm, (without leave of the Crown first obtained,) shall fit out any armed vessel for the service of any foreign State, or shall issue any commission for any such vessel, or shall increase the

(*m*) 12 Geo. 3, c. 24; 7 & 8 Geo. 4, c. 28, ss. 6, 7. See also 22 Geo. 2, c. 33, s. 2, art. 25, as to the offence of firing magazines or ships, &c.

(*n*) Another of the conditions of the bond mentioned in 3 Jac. 1, c. 4, is "not to be reconciled to the see of Rome." It may be observed that the *treasons* created by this statute, as well as the provisions against popish recusants, and concerning the holy sacrament, were repealed by 7 & 8 Vict. c. 102.

(*o*) As to this Act, see Dobree *v.* Napier, 2 Bing. N. C. 781.

(*p*) As to the offence of receiving a *pension* from a foreign prince, vide post, p. 268.

number of guns of such vessel, or be concerned in augmenting the force of any foreign armed vessel arriving in this country;—such offender shall also be guilty of a misdemeanor, and may be punished in the same manner as last particularized.

Moreover, any ship having on board such persons, so illegally enlisted, may be prevented from proceeding on her voyage; and the master thereof, if he shall have knowingly received such persons on board, may be fined in the penalty of 50*l.* for every such person respectively.

XV. The offences of *desertion*, or *seducing to desert*, from the army or navy (*q*).

These offences are now provided against by the annual mutiny and marine Acts (*r*); by which they are placed under the jurisdiction of courts-martial, and punished with such punishment as those courts shall inflict.

The offence of a civilian seducing soldiers to desert, is also punishable by 1 Geo. I. c. 47; which enacts, that if any person, not himself enlisted, shall attempt to persuade any soldier to desert or leave the service, he shall forfeit 40*l.*, to be recovered in one of the superior courts of law; and may also, at the discretion of the court, be imprisoned for any term not more than six months.

And, moreover, any person maliciously endeavouring to seduce any person, serving in the Royal forces by sea or land, from their allegiance; or stirring up any such persons to mutiny or other traitorous practice;—is liable to penal servitude for life, or any term not less than fifteen years; or to be imprisoned, with or without hard labour or solitary confinement, for any term not more than three years (*s*).

(*q*) As to deserting from, and mutiny in, the service of the *East India Company*, see 12 & 13 Vict. c. 43; 20 & 21 Vict. c. 56. As to seamen or apprentices deserting from the *merchant service*, see 17 & 18 Vict. c. 104, s. 243.

(*r*) Vide sup. vol. II. pp. 506, 602. There are also the statutes 18 Hen. 6, c. 19; 5 Eliz. c. 5; and 2 & 3 Edw. 6, c. 2; but these are obsolete; (see Russ. on Crimes, vol. i. p. 93.)

(*s*) 37 Geo. 3, c. 70; 57 Geo. 3,

XVI. It is also an offence against the royal title and government to refuse or neglect to take the oaths of allegiance, supremacy, and abjuration, within such period as the law requires after admission to any office. But of this we had occasion to speak in a former part of the work; and it will be therefore unnecessary to resume the subject (*t*).

XVII. Another offence of this description is that of administering *unlawful oaths*; or being engaged in *illegal societies*.

It is enacted, that, whoever shall administer or cause to be administered, or shall be present at and consenting to the administering of,—or shall himself take—any oath or engagement intended to bind any person in any mutinous or seditious purpose; or to belong to any seditious society or confederacy; or to obey any committee, or any person not having legal authority for that purpose; or not to give evidence against any confederate or other person; or not to discover any *unlawful combination*, or any illegal act, or any illegal oath or engagement,—shall be guilty of felony, and may be sentenced to penal servitude for not more than seven or less than three years (*u*).

And it is further provided, that compulsion shall be no excuse, unless the party, within four days after he has an opportunity, shall disclose the whole of the case to a justice of the peace; or, if the party compelled be a soldier or seaman, to his commanding officer.

Again, societies of which the members shall take oaths or engagements prohibited by 37 Geo. III. c. 123; or for the commission of treason, murder, or capital felony; or any oath or engagement not required by law; or of which the members shall subscribe any unauthorized test or de-

c. 7; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*t*) Vide sup. vol. II. p. 625; and vol. III. p. 58.

(*u*) 37 Geo. 3, c. 123; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

claration,—and any society which shall comprise members the names whereof shall be unknown to the society at large, or which shall consist of different branches, or which shall elect committees or delegates to communicate with other societies,—are, all of them, deemed by law *unlawful combinations* (*x*); and persons becoming members thereof, or aiding, abetting, or supporting the same, may be proceeded against either in a summary way before one justice or more, who may fine 20*l.* (*y*), or imprison for three calendar months; or they may be prosecuted by indictment, and sentenced to penal servitude for not more than seven or less than three years, or imprisoned for any time not exceeding two years (*z*). When the objects of the society, however, are not mutinous, seditious, treasonable, or felonious, these provisions are subject to exception;—as in the case of regular lodges of Freemasons, societies duly established under the statutes in force relating to friendly societies (*a*), meetings of Quakers, and meetings of a religious or charitable nature only: and such as relate to oaths and engagements, do not extend to any form of declaration approved by two justices, and registered as in the Acts provided (*b*).

Again, every person who shall administer or cause to be administered, or be aiding or assisting in the administration of, any oath or engagement intending to bind the party sworn to the commission of any treason, murder or capital felony,—shall be guilty of felony (*c*); and he may be sentenced to penal servitude for life, or for not less than fifteen years, or be imprisoned, with or without hard labour and solitary confinement, for any term not more

(*x*) 39 Geo. 3, c. 79; 57 Geo. 3, c. 123; 2 & 3 Vict. c. 12.

(*y*) By 51 Geo. 3, c. 65, s. 2, this may be mitigated to any sum not less than 5*l.*

(*z*) 39 Geo. 3, c. 79; 57 Geo. 3, c. 123; 2 & 3 Vict. c. 12; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*a*) See as to these, sup. vol. III. p. 200.

(*b*) By 9 & 10 Vict. c. 33, proceedings under 39 Geo. 3, c. 79, and 57 Geo. 3, c. 19, must be in the name of the law officers of the Crown.

(*c*) 52 Geo. 3, c. 104; 7 Will. 4 & 1 Vict. c. 91.

than three years; and every one taking such oath or engagement, (not being compelled,) shall be also guilty of felony, and be liable to penal servitude for life, or such time as the court may direct; and it is further provided, that compulsion shall be no excuse, unless the party makes discovery of the case within fourteen days (*d*).

Lastly, all meetings and assemblies of persons for the purpose of being trained, or of practising military exercise, without lawful authority, are prohibited by statute (*e*): persons attending there for the purpose of training others are made liable to penal servitude for not more than seven or less than three years, or to be imprisoned for two years (*f*); and those attending for the purpose of being trained, may be fined and imprisoned for two years (*g*).

XVIII. We shall conclude the chapter with a notice of certain *miscellaneous contempts* against the royal prerogative, not properly falling under any of the preceding heads. Such as, 1. Concealing treasure trove, which, (as we have elsewhere explained (*h*),) [belongs to the sovereign or his grantees by prerogative royal;] and the concealment of which was formerly punishable by death (*i*), but now only by fine and imprisonment (*j*). 2. [Preferring the interests of a foreign potentate to those of our own, or doing or receiving anything that may create an undue influence in favour of such extrinsic power; as by taking a pension from any foreign prince without the consent of the Crown (*k*).] 3. [Disobeying the sovereign's lawful commands;—whether by writs issuing out of his courts of justice; or by a summons to attend his privy council; or by letter from him to a subject, commanding him to re-

(*d*) 52 Geo. 3, c. 104; 7 Will. 4 & 1 Vict. c. 91; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.
(*e*) 60 Geo. 3 & 1 Geo. 4, c. 1.
(*f*) 60 Geo. 3 & 1 Geo. 4, c. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.
(*g*) 60 Geo. 3 & 1 Geo. 4, c. 1.
(*h*) Vide sup. vol. II. p. 546.
(*i*) Glanv. l. 1, c. 2.
(*j*) 3 Inst. 133.
(*k*) 3 Inst. 144.

[turn from beyond the seas, (for disobedience to which, his lands shall be seized till he does return, and himself afterwards punished); or by the writ of *ne exeat regno*, or proclamation commanding the subject to stay at home (*l*).] 4. (and lastly). [Disobedience to any Act of parliament, where no particular penalty is assigned.] All these are instances of misprisions and contempts; and all are punishable by fine and imprisonment at the discretion of the courts of justice (*m*).

(*l*) Vide sup. vol. II. p. 515.

(*m*) Hawk. P. C. b. 1, c. 22, s. 5.

CHAPTER VII.

OF OFFENCES AGAINST RELIGION.



It has been laid down at the outset of this work (*a*), that *rights* are liberties secured to the individual by the compact of civil society; and at the beginning of this Book we have defined *crimes* as the violation of rights when considered in a particular point of view, viz. in reference to the evil effect of such violation as regards the community at large (*b*). It follows from this, that crimes, in contemplation of law, essentially consist in the breach of human institutions; and therefore, though the offences in this and the following chapter are enumerated as offences against religion and the law of nations, which are equivalent to the law of God and the law of nature; yet in a treatise of municipal law, we must consider them as deriving their particular guilt from the law of man.

Of offences against religion, of which cognizance is thus taken by human tribunals, the first is that of—

I. [*Apostasy*, or a total renunciation of Christianity, by embracing either a false religion or no religion at all. This offence can only take place, in such as have once professed the true religion. The perversion of a Christian to judaism, paganism, or other false religion, was punished by the Emperors Constantius and Julian with confiscation of goods (*c*): to which the Emperors Theodosius and Valentinian added capital punishment, in case the apostate en-

(*a*) Vide sup. vol. I. p. 30.
(*b*) Vide sup. p. 77.
(*c*) Cod. l. 7, 1.

[deavoured to pervert others to the same iniquity (*d*): a punishment too severe for any temporal laws to inflict upon any spiritual offence: and yet the zeal of our ancestors imported it into this country; for we find by Bracton (*e*), that in his time apostates were to be burnt to death. Doubtless the preservation of Christianity, as a national religion is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state; which a single instance sufficiently will demonstrate.

The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the Supreme Being, and a firm persuasion that he superintends and will finally compensate every action in human life, all which are clearly revealed in the doctrines and forcibly inculcated by the precepts of our Lord and Saviour Christ,—these are the grand foundation of all judicial oaths; which call God to witness the truth of those facts which, perhaps, may be only known to Him and the party attesting: all moral evidence, therefore, all confidence in human veracity, must be weakened by apostasy and overthrown by total infidelity (*f*). Wherefore all affronts to Christianity, or endeavours to depreciate its efficacy in those who have once professed it, are highly deserving of censure. But yet the loss of life is a heavier penalty than the offence, taken in a civil light, deserves; and taken in a spiritual light, our laws have no jurisdiction over it. This punishment, therefore, has long ago become obsolete; and the offence of apostasy was for a long time the object only of the ecclesiastical courts, which corrected the offender *pro salute animæ.* But about the close of the sixteenth century the civil liberties to which we were

(*d*) Cod. 6.

(*e*) L. 3, c. 9.

(*f*) "*Utiles esse opiniones has, quis neget, cum intelligat, quam multa firmentur jurejurando; quantæ salutis sint fœderum religiones; quam multos divini supplicii metus a scelere revocarit; quamque sancta sit societas civium inter ipsos, Diis immortalibus interpositis tum judicibus, tum testibus?* —Cic. de LL. ii. 7.

[then restored, being used as a cloak of maliciousness ; and the most horrid doctrines subversive of all religion, being publicly avowed, both in discourse and writings; it was thought necessary again for the civil power to interpose, by not admitting those miscreants (*g*) to the privileges of society, who maintained such principles as destroyed all moral obligation. To this end it was enacted by stat. 9 & 10 Will. III. c. 32, that if any person educated in, or having made profession of, the Christian religion, shall by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the Holy Scripture to be of divine authority, he shall, upon the first offence be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of bringing any action, (being guardian, executor, legatee, or purchaser of lands,) and shall suffer three years' imprisonment without bail. To give room, however, for repentance:—if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

II. A second offence is that of *heresy*, which consists not in a total denial of Christianity, but of some of its principal doctrines, publicly and obstinately avowed (*h*).] But of this offence, (now subject only to ecclesiastical correction *pro salute animæ*, and no longer punishable by the secular law,) enough has been said in that part of the work which relates to the Church and its doctrines (*i*).

III. Another species of offences against God and religion, [is that of *blasphemy* against the Almighty by denying His being or providence; or by contumelious reproaches of our Lord and Saviour Christ: whither, also, may be referred all profane scoffing at the Holy Scripture, or exposing it to contempt and ridicule. These are offences

(*g*) *Mescroyantz* in our antient law books is the name of unbelievers.

(*h*) 1 Hale, P. C. 384.

(*i*) Vide sup. vol. III. p. 48.

[punishable at common law by fine and imprisonment, or other infamous corporal punishment (*k*): for Christianity is part of the laws of England (*l*);] and a blasphemous libel may be prosecuted as an offence at common law, and punished with fine and imprisonment (*m*).

IV. A fourth species of offences against religion are those which affect the Established Church; and these are said by Blackstone (*n*) [to be either positive or negative: positive, by reviling its ordinances; or negative, by non-conformity to its worship.] But we shall confine our remarks to the former offence: the latter being now nearly reduced to a mere name by the effect of the many modern Acts passed for the extension of the principle of religious toleration; and its history having been already traced in that part of this work where we had occasion to consider the Church and its worship (*o*).

As to the offence of *reviling the ordinances of the Church*. [This is a crime of a much grosser nature than the other of mere non-conformity; since it carries with it the utmost indecency, arrogance, and ingratitude: indecency, by setting up private judgment in virulent and factious opposition to public authority; arrogance, by treating with contempt and rudeness what has at least a better chance to be right than the singular notions of any particular man; and ingratitude, by denying that indulgence and undisturbed liberty of conscience to the members of the national Church, which the retainers to every petty conventicle enjoy. However, it is provided by statute 1 Edw. VI. c. 1, and 1 Eliz. c. 1, that whoever reviles the sacrament of the Lord's Supper

(*k*) Hawk. P. C. b. 1, c. 5, s. 5.

(*l*) 1 Vent. 293; R. *v.* Woolston, Str. 834; Hawk. P. C. b. 1, c. 5, s. 6. In the thirty-fourth year of Henry the sixth, Chief Justice Prisot declared in the Court of Common Pleas,—"*Scripture est common ley, sur quel touts manieres de leis sont fondés.*" See the Year Book, 34 Hen. 6, 40.—Ch.

(*m*) R. *v.* Carlisle, 3 B. & Ald. 161; Hawk. P. C. b. 1, c. 5. Vide sup. vol. II. p. 38, et post, c. X.

(*n*) Vide 4 Bl. Com. 50.

(*o*) Vide sup. vol. III. p. 53.

[shall be punished by fine and imprisonment; and by the statute 1 Eliz. c. 2, if any minister shall speak any thing in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second: and, if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second offence he shall be deprived, and suffer one year's imprisonment; and, for the third, shall in like manner be deprived, and suffer imprisonment for life: and if *any person* whatsoever shall in plays, songs, or other open words, speak anything in derogation, depraving or despising of the said Book, or forcibly prevent the reading of it, or cause any other service to be used in its stead,—he shall forfeit, for the first offence, a hundred marks; for the second, four hundred; and, for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. These penalties were framed in the infancy of our present establishment, when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy; and the terror of these laws, (for they seldom, if ever, were fully executed,) proved a principal means, under Providence, of preserving the purity as well as decency of our national worship. Nor can their continuance to this time, (of the milder penalties at least,) be thought too severe and intolerant, so far as they are levelled at the offence, not of *thinking* differently from the national Church, but of *railing* at that Church and *obstructing* its ordinances, for not submitting its public judgment to the private opinion of others. For though it is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate (*p*).]

V. Another offence against God and religion, is that [of profane and common *swearing* and *cursing*. By the last

(*p*) See also 9 & 10 Will. 3, c. 32, sup. p. 272; vol. III. p. 53.

[statute against which, 19 Geo. II. c. 21, which repeals all former ones, every labourer, sailor (*q*), or soldier, profanely cursing or swearing, shall forfeit one shilling; every other person, under the degree of a gentleman, two shillings; and every gentleman or person of superior rank, five shillings; to the poor of the parish] wherein such offence was committed: [and, on a second conviction, double, and for every subsequent offence, treble, the sum first forfeited, with all charges of conviction; and, in default of payment, shall be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing or the testimony of one witness: and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him;] but the conviction must be within eight days after the committal of the offence. [If the justice omits his duty, he forfeits five pounds, and the constable forty shillings.]

VI. Another offence of the description under consideration, is that of *using pretended witchcraft, conjuration, enchantment, and sorcery.* Our law once included in the list of crimes, that of *actual* witchcraft or intercourse with evil spirits; and though it has now no longer a place among them, its exclusion is not to be understood as implying a denial of the possibility of such an offence. To deny this, would be to contradict [the revealed word of God in varions passages both of the Old and New Testament; and the thing itself, is a truth to which every nation in the world hath in its turn borne testimony; either by examples seemingly well attested, or by prohibitory laws, which at least suppose the possibility of a commerce with evil spirits. The civil law punishes with death not only the sorcerers themselves, but also those who consult them (*r*); imitating

(*q*) Also persons "belonging to the navy" are liable to suffer such punishment for profane swearing, as a court-martial shall think proper to inflict. 22 Geo. 2, c. 33, s. 2, art. 2.

(*r*) Cod. l. 9, c. 18.

[in the former the express law of God (*s*), "Thou shalt not suffer a witch to live." And our laws, both before and since the Conquest, have been equally penal; ranking this crime in the same class with heresy, and condemning both to the flames (*t*). The President Montesquieu (*u*) ranks them also both together, but with a very different view; laying it down as an important maxim, that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals, and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these. And indeed, the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a doubtful crime; if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own (*v*), that in general there has been such a thing as witchcraft, though one cannot give credit to any particular modern instance of it.

Our forefathers were stronger believers when they enacted, by statute 33 Henry VIII. c. 8, all witchcraft and sorcery to be felony without benefit of clergy; and again, by statute 1 Jac. I. c. 12, that all persons invoking any evil spirit; or consulting, covenanting with, entertaining, employing, feeding or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm, or enchantment; or killing or otherwise hurting any person by such infernal arts;—should be guilty of felony and suffer death: and that if any person should attempt, by sorcery, to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, (though the same were not effected,) he, or she, should suffer imprisonment and pillory for the first offence, and death for the second. These Acts long

(*s*) Exod. xxii. 18.
(*t*) 3 Inst. 44.
(*u*) Sp. L. b. 12, c. 5.
(*v*) Mr. Addison, Spect. No. 117.

[continued in force, to the terror of all antient females in the kingdom: and many poor wretches were sacrificed, thereby, to the prejudice of their neighbours and their own illusions; not a few having, by some means or other, confessed the fact at the gallows. But all executions for this dubious crime are now at an end: our legislature having at length followed the wise example of Louis the fourteenth in France; who thought proper, by an edict, to restrain the tribunals of justice from receiving informations of witchcraft (*w*). And accordingly it is with us enacted, by statute 9 Geo. II. c. 5, that no prosecution shall for the future be carried on against any person for witchcraft, sorcery, enchantment, or conjuration; or for charging another with any such offence (*x*).] But, by the same statute, persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in any occult or crafty science,—are punishable by imprisonment: and by 5 Geo. IV. c. 83, s. 4, persons using any subtle craft, means, or device, by palmistry or otherwise, to deceive his majesty's subjects,—are to be deemed *rogues* and *vagabonds* (*y*); and to be punished with imprisonment and hard labour.

VII. [A seventh species of offenders in this class, are all *religious impostors;* such as falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment (*z*).]

VIII. *Simony* is also to be considered as an offence against religion, [by reason of the sacredness of the charge

(*w*) Voltaire, Siècl. Louis 14, c. 29; Mod. Un. Hist. xxv. 215.

(*x*) This Act is said to have passed, in consequence of an old woman being drowned at Tring, in Hertfordshire, by her too credulous neighbours, who suspected her of witchcraft.—(Christian's Blackstone.)

(*y*) Vide post, c. XII.

(*z*) Hawk. P. C. b. 1, c. 5, s. 3.

[which is thereby profanely bought and sold.] Its nature and the punishment to which it is subject having been already described in a former part of this work,—where we treated of the endowments and provisions of the Church (*a*), —it will be unnecessary to recur to them in this place, and we shall pass on to consider—

IX. *Profanation of the Lord's Day,* (commonly, but improperly, called *sabbath breaking,*)] which is a ninth offence of the class now in question. For as it is deemed, by the best authorities on religious subjects, to be a violation of the divine law, under the new as well as the old dispensation, so there is a [notorious indecency and scandal, in permitting any secular business to be publicly transacted on that day, in a country professing Christianity :] and it is found, in fact, that a [corruption of morals usually follows its profanation.] It is unquestionable, besides, that [the keeping one day in seven holy, as a time of relaxation and refreshment, as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity, and savage selfishness of spirit. It enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people, that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and effaced by an unremitted continuance of labour without any stated times of recalling them to the worship of their Maker; and therefore the laws of King Athelstan (*b*), forbade all merchandizing on the Lord's day, under very severe penalties; and by the statute 27 Henry VI. c. 5, no fair or market shall be held on Good Fridays or on any Sunday, (except the four Sundays in harvest (*c*),)] unless for necessary victual, [on

(*a*) Vide sup. vol. III. p. 75.

(*b*) C. 24.

(*c*) This exception is repealed by 13 & 14 Vict. c. 23.

[pain of forfeiting the goods exposed to sale. By statute also 1 Car. I. c. 1, no persons shall assemble, out of their own parishes, for any sport whatever upon this day; nor, in their parishes, shall use any bull, or bear, baiting, interludes, plays, or other unlawful exercises or pastimes,—on pain that every offender shall pay three shillings and fourpence to the poor.] Moreover, by statute 29 Car. II. c. 7, no tradesman, artificer, workman, labourer, or other person whatever, is allowed to do any work of their ordinary calling upon the Lord's day,—works of necessity and charity only excepted,—on pain that every person, of fourteen years, so offending shall forfeit five shillings: and, by the same Act, no person shall publicly expose to sale any wares whatever upon the Lord's day, upon pain of forfeiting the goods; and no drover, or the like, shall travel or come into his inn or lodging on that day, upon pain of forfeiting twenty shillings; and no person, on that day, shall serve or execute any process, (except for treason, felony or breach of the peace); and such service or execution if made shall be void to all intents and purposes whatever (*d*). Also, by 21 Geo. III. c. 49, any house which shall be used for public entertainment or public debate on the Lord's day, and to which persons shall be admitted by the payment of money, shall be deemed a disorderly house; and subject to the punishment which the law provides in the case of houses of that description (*e*). And lastly, by 18 & 19 Vict. c. 118 (*f*), no licensed victualler or person licensed to sell

(*d*) See also as to carriers, 3 Car. 1, c. 1; as to fish carriages, 2 Geo. 3, c. 15; as to bakers, 34 Geo. 3. c. 61; 50 Geo. 3, c. 73, s. 3; 1 & 2 Geo. 4, s. 50, s. 11; as to bakers in London, 3 Geo. 4, c. cxvi. s. 16; as to watermen, 11 & 12 Will. 3, c. 24, s. 13; as to watermen on the Thames, 7 & 8 Geo. 4, c. lxxv.; as to killing game on Sunday, 1 & 2 Will. 4, c. 32, s. 3. And see as to the construction of statute 29 Car. 2, c. 7, Sandiman *v.* Breach, 7 Barn. & Cress, 96; R. *v.* Whitnash, ibid. 596; Peate *v.* Dicken, 5 Tyr. 116; Scarfe *v.* Morgan, 1 H. & H. 292; Beaumont *v.* Brengeri, 5 C. B. 301.

(*e*) As to disorderly houses, vide post, c. XII.

(*f*) By this Act, a statute of the preceding session,—17 & 18 Vict. c. 79,—on the same subject, was repealed. See also a previous Act, 11 & 12 Vict. c. 49.

beer by retail, or to sell fermented or distilled liquors; or entitled to sell wine, as a vintner of the city of London; shall open his house for sale of such liquors, or sell the same, on Sunday, Christmas Day, Good Friday, or any Fast or Thanksgiving day, between the hours of three and five o'clock in the afternoon,—nor after eleven o'clock in the afternoon of any such day, or before four o'clock in the morning of the day following the same. There is, however, a proviso in favour of liquor sold to a traveller or lodger. Moreover, by the same Act, *no* person shall, except in the way of refreshment for travellers, open any house or place of public resort, for the sale of fermented or distilled liquors, or sell such liquors therein, within the times during which the sale thereof, by licensed persons or vintners, is prohibited as above mentioned. The penalty attached, in each of the above cases, is the forfeiture of a sum not exceeding *5l.* for every offence, to be recovered on summary conviction before a justice of the peace; and every separate sale shall be deemed a separate offence.

CHAPTER VIII.

OF OFFENCES AGAINST THE LAW OF NATIONS.

[According to the method marked out in the preceding chapter, we are next to consider the offences more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another: those, at least, which are particularly animadverted on, as such, by the English law.

The law of nations,] to which we have before had occasion briefly to advert (*a*), is a system of rules, [established by universal consent, among the civilized inhabitants of the world (*b*); in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent States, and the individuals belonging to each: being founded upon this general principle, that different nations ought, in time of peace, to do one another all the good they can: and in time of war, as little harm as possible, without prejudice to their own real interests (*c*). And as none of these States will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree,] and to which all civilized States have assented.

[In arbitrary States this law, whenever it contradicts, or is not provided for by the municipal law of the country, is

(*a*) Vide sup. vol. I. p. 25.
(*b*) Ff. 1, 1, 9.
(*c*) Sp. L. b. 1, c. 7.

[enforced by the royal power; but, since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and held to be the law of the land. And those Acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilized world. Thus, in mercantile questions, such as bills of exchange and the like, and in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature, the law merchant is constantly adhered to (*d*).

But though in civil transactions, and questions of property, between the subjects of different States, the law of nations has much scope and extent, as adopted by the law of England; yet the present branch of our inquiries will fall within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular State. For offences against this law, are principally incident to whole States or nations; in which case recourse can only be had to war, which is an appeal to the God of hosts, to punish such infractions of public faith as are committed by one independent people against another; neither State having any superior jurisdiction to resort to upon earth, for justice. But where the individuals of any State violate this general law, it is then the interest, as well as duty, of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations, in their collective capacity, observe these universal rules, if private subjects were at liberty to break

(*d*) As to the law merchant, vide sup. vol. I. p. 56.

[them at their own discretion, and involve the two States in a war. It is, therefore, incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the State to which he belongs; and if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds: I. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.

I. As to the first, *violation* of *safe-conducts* or *passports*, expressly granted by the sovereign or his ambassadors (*e*), to the subjects of a foreign power, in time of mutual war; or the committing acts of hostilities against such as are in amity, league or truce with us, who are, in this case, under a general implied safe-conduct;—these are breaches of the public faith: without the preservation of which, there can be no intercourse or commerce between one nation and another. And such offences may, (according to the writers upon the law of nations,) be a just ground of a national war; since it is not in the power of the foreign prince to cause justice to be done to his subject by the very individual delinquent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law; and more especially as it is one of the articles of *Magna Charta* (*f*), that foreign merchants should be entitled to safe-conduct and security throughout the kingdom;—there is no question but that any violation of either the person or property of such foreigner, may be punished by indictment in the name of the sovereign; whose honour is more particularly engaged, in supporting his own safe-conduct. And when this malicious rapacity was not confined to private individuals, but broke

(*e*) Vide sup. vol. II. p. 506.

(*f*) 9 Hen. 3, c. 30.

[out into general hostilities,—by the statute 2 Hen. V. st. 1, c. 6, the breaking of truce and safe-conducts, or abetting and receiving the truce-breakers, was, (in affirmance and support of the law of nations,) declared to be high treason against the crown and dignity of the king; and conservators of truce and safe-conducts, were appointed in every port, and empowered to hear and determine such treasons when committed at sea, according to the antient marine law then practised in the admiral's court. Which statute, so far as it made these offences amount to treason, was suspended by 14 Hen. VI. c. 8, and repealed by 20 Hen. VI. c. 11; but it was revived by 29 Hen. VI. c. 2, which gave the same powers to the lord chancellor, associated with either of the chief justices, as belonged to the conservators of truce and their assessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects, prior to any claim of the Crown. And it is further enacted by the statute 31 Hen. VI. c. 4, that if any of the king's subjects attempt or offend upon the sea, or in any port within the king's obeisance, against any stranger in amity, league or truce, or under safe-conduct,—and especially by attaching his person, or spoiling him or robbing him of his goods;—the lord chancellor, (with any of the justices of either the King's Bench or Common Pleas,) may cause full restitution and amends to be made to the party injured.

It is to be observed, that the suspending and repealing Acts of the fourteenth and twentieth years of Henry the sixth, and also the reviving act of the twenty-ninth of the same monarch, were only temporary; so that it should seem that after the expiration of them all the statute of the second year of Henry the fifth continued in full force: but yet it is considered as extinct by the statute 14 Edw. IV. c. 4; which revives and confirms all statutes and ordinances made before the accession of the house of York, against breakers of amities, truces, leagues, and safe-conducts, with an express exception to the statute of 2 Hen. V. st. 1, c. 6.

[But however that may be,] this statute was, (according to Blackstone (*g*),) [finally repealed by the general statutes of Edward the sixth, and Queen Mary, for abolishing new created treasons; though Sir Matthew Hale seems to question it, as to treason committed on the sea (*h*). But the statute of 31 Hen. VI. remains in full force to this day.

II. As to the rights of *ambassadors*,—which are also established by the law of nations, and are therefore matter of universal concern,—they have formerly been treated of at large,] in that part of this work in which we discussed the nature and extent of the royal prerogative; and it may be recollected, that any violation of them amounts, by express legislative enactment, to a crime of a highly penal nature (*i*).

III. [Lastly, the crime of *piracy*, (or robbery and depredation upon the high seas,) is an offence against the universal law of society; a pirate being, according to Sir Edward Coke (*j*), *hostis humani generis*. As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him; so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would, in a state of nature, have been otherwise entitled to do, for any invasion of his person or personal property.

By the antient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and by an alien, to be felony only; but now, since the statute of treasons, 25 Edw. III. c. 2, it is held to be only felony in a subject (*k*). Formerly, it was only cognizable by the admiralty courts;] whose proceedings, (as we have elsewhere remarked (*l*),) are founded

(*g*) 4 Bl. Com. p. 70.
(*h*) 1 Hale, P. C. 267.
(*i*) Vide sup. vol. II. p. 496.
(*j*) 3 Inst. 113.
(*k*) Ibid.
(*l*) Vide sup. p. 20.

in a great measure upon the rules of the civil law (*m*). [But, it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land,—the statute 28 Hen. VIII. c. 15, established a new jurisdiction for this purpose; which proceeds according to the course of the common law, and of which we shall say more hereafter (*n*).

The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas,] or other places where the admiralty has jurisdiction, [which, if committed upon land, would have amounted to felony there (*o*). But by statute, some other offences are made piracy also; as, by stat. 11 & 12 Will. III. c. 7,] (made perpetual by 6 Geo. I. c. 19,) [if any natural-born subject commits any act of hostility upon the high seas against others of his majesty's subjects, under colour of a commission from any foreign power; this, though it would be only an act of war in an alien, shall be construed piracy in a subject. And further, any commander, or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition or goods; or yielding them up, voluntarily, to a pirate; or conspiring to do these acts:—or any person assaulting the commander of a vessel to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board (*p*);—shall, for each of these offences, be adjudged a pirate, felon, and robber.] Again, [by the statute 8 Geo. I. c. 24,] (made perpetual by 2 Geo. II. c. 28, s. 7,) [the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in anywise consulting, combining, confederating, or corresponding with them; or the forcibly boarding any

(*m*) Hawk. P. C. b. 1, c. 37, s. 3.

(*n*) Vide post, c. XIV.

(*o*) Hawk. P. C. b. 1, c. 37; vide sup. vol. I. p. 115; et post, c. XIV.

(*p*) See R. *v.* M'Gregor, 1 Car. & Kir. 430; R. *v.* Hastings, 1 M. C. C. R. 82.

[merchant vessel, (though without seizing or carrying her off,) and destroying or throwing any of the goods overboard;—shall be deemed piracy.] Moreover, [by statute 18 Geo. II. c. 30, any natural-born subject or denizen, who in time of war shall commit hostilities at sea against any of his fellow subjects, or shall assist an enemy on that element,—is liable to be tried and convicted as a pirate (*q*).] And, lastly, in our own times, a further addition has been made to the list of piratical offences: for, with the view of putting an effectual stop to the slave trade (*r*), the statute 5 Geo. IV. c. 113 (*s*), enacts, that if any British subject, wherever residing,—and whether within the dominion of Great Britain or of any foreign country, or in the colonies, or in places under the government of the East India Company,—shall (except in some particular cases therein specified), within the jurisdiction of the Admiralty, knowingly convey, or assist in conveying, persons as slaves, or to be dealt with as slaves, or ship them for that purpose, he shall be deemed guilty of piracy, felony and robbery; and he is liable to penal servitude for life, or for any term not less than fifteen years, or to be imprisoned, (with or without hard labour,) for any term not exceeding three years (*t*).

Until lately the punishment for piratical offences, in general, was death: but it has been thought expedient to relax this severity; and, now, whoever shall be convicted of any offence, by the statutes, referred to in 7 Will. IV.

(*q*) Blackstone remarks (vol. iv. p. 73), that, under the statutes relating to piracy, commanders or seamen wounded, and the widows of seamen slain, in any piratical engagement, are entitled to a bounty to be divided amongst them, not exceeding one-fiftieth part of the value of the cargo on board. And further, that if the commander displays cowardice, he shall forfeit all his wages, and suffer six months' imprisonment. Et vide sup. p. 33, as to the condemnation in the Court of Admiralty of ships and goods taken from pirates, and the salvage payable by the owners.

(*r*) Vide sup. vol. I. p. 108.

(*s*) See also 6 & 7 Vict. c. 98.

(*t*) 5 Geo. 4, c. 113; 7 Will. 4 & 1 Vict. c. 91; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. See R. *v.* Zulueta, 1 Car. & Kir. 215; Buron *v.* Denman, 2 Exch. 167.

& 1 Vict. c. 88, amounting to piracy, and made punishable with death,—is liable to be sentenced to penal servitude for life or any term not less than fifteen years; or to be imprisoned, (with or without hard labour,) for any term not more than three years (*u*). But whoever, with intent to commit, or at the time of or immediately before or after committing, the crime of piracy, shall assault with intent to murder, or stab or wound, or unlawfully do any act by which the life of any person on board any vessel may be endangered, shall suffer death as a felon (*x*).

[These are the principal cases in which the statute law of England interposes to aid and enforce the law of nations, as a part of the common law; by inflicting an adequate punishment upon offences against that universal law, committed by private persons. We shall proceed, in the next chapter, to consider offences which more immediately affect the executive power of our own particular State, or the sovereign and his government; which species of crimes branches itself into a much larger extent, than either of those of which we have already treated.]

(*u*) 7 Will. 4 & 1 Vict. c. 88; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.
(*x*) 7 Will. 4 & 1 Vict. c. 88.

CHAPTER IX.

OF OFFENCES AGAINST PUBLIC JUSTICE.

WE are now arrived, according to the arrangement before laid down (*a*), at the consideration of offences against public justice. Of these, some are felonious, others only misdemeanors.

I. *Stealing*, *injuring*, and *falsifying* records, are high offences against public justice. For, as observed by Sir W. Blackstone, [no man's property would be safe if records might be suppressed or falsified, or persons' names be falsely usurped in courts, or before their public officers.] It is accordingly enacted, that if any person shall steal; or for any fraudulent purpose take from its place of deposit, or from any person having the lawful custody thereof; or shall maliciously obliterate, injure, or destroy;—any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, warrant of attorney, or any original document whatever belonging to any court of record or of equity, or relating to any matter pending in any court of record or of equity: the offender, in any of the cases aforesaid, shall be guilty of a misdemeanor, and may be sentenced to penal servitude for not more than seven or less than three years, or to such other punishment, by fine, or imprisonment (with or without hard labour or solitary confinement), as the court shall award (*b*). Likewise to acknowledge any deed to be enrolled, *cognovit actionem*, or judgment, in the name of another person not privy to

(*a*) Vide sup. p. 218.

(*b*) 7 & 8 Geo. 4, c. 29, s. 21; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

the same; or to acknowledge any recognizance or bail, (whether filed or not,) in the name of any other person not privy to the same, before any court, judge, or other person lawfully authorized to take any recognizance or bail;—is felony, and punishable by penal servitude for life, or any time not less than three years; or by imprisonment, with or without hard labour and solitary confinement, for not more than four years, or less than two years (*c*). Moreover, by 1 & 2 Vict. c. 94 (intituled "An Act for keeping safely the Public Records,") it is enacted, that for any person employed in the Public Record Office by that Act established, to certify any writing as a true copy of a record in the custody of the Master of the Rolls, knowing the same to be false in any material part,—shall be felony: and he is punishable with penal servitude for life, or not less than three years; or imprisonment for not more than four, nor less than two years (*d*). And lastly, by 14 & 15 Vict. c. 99 (the "Evidence Amendment Act, 1851"), if any officer authorized or required by that Act to furnish any certified copies or extracts, shall wilfully certify any document as being a true copy or extract, knowing that the same is not so, he shall be guilty of a misdemeanor; and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months (*e*).

II. *Striking*, or *other outrage, in the superior courts of justice*, in Westminster Hall, or at the assizes, is highly penal. Indeed [by the antient common law before the Conquest (*f*), striking in the king's courts of justice, or

(*c*) 11 Geo. 4 & 1 Will. 4, c. 66, s. 11; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. Under the former law on this subject, personating bail, if it were not filed, was a mere misdemeanor. 1 Hale, P. C. 696; Timberlye's case, 2 Sid. 90. See also 1 Str. 384.

(*d*) 1 & 2 Vict. c. 94, s. 19; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*e*) 14 & 15 Vict. c. 99, s. 15. As to *forgery* of official and judicial documents generally, or of the seals or signatures thereto, vide sup. p. 214, n. (*o*).

(*f*) Wilk. Leg. Anglo-Sax. LL. Inæ, c. 6; LL. Canut. c. 56; LL. Alured. c. 7.

[drawing a sword therein, was a capital felony; and our modern law retains so much of the antient severity, as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or blow in] the superior courts, or courts of assize or *oyer* and *terminer*, [whether blood be drawn or not; or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck;—is punishable with the loss of the right hand (*g*), imprisonment for life, and forfeiture of goods and chattels, and of the profits of the offender's lands during life (*h*).] Moreover, not only such as commit actual violence of this description, but such as use [threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision; and have been punished with large fines, imprisonment, and other corporal punishment (*i*). And even in the inferior courts of the king, an affray or contemptuous behaviour is punishable with a fine, by the

(*g*) Lord Thanet and others were prosecuted by an information filed by the attorney-general, for a riot at the trial of Arthur O'Connor and others for treason, under a special commission at Maidstone. Two of the defendants were found guilty, generally. The three first counts charged, (*inter alia,*) that the defendants did riotously make an assault on one J. R., and did then and there *beat, bruise, wound* and ill-treat the said J. R., in the presence of the commissioners. When the defendants were brought up for judgment, Lord Kenyon expressed doubts, whether, upon this information, the court was not bound to pronounce the judgment of amputation of the right hand, &c. as required in a prosecution expressly for striking in a court of justice. In consequence of these doubts, the attorney-general entered a *nolle prosequi* upon the three first counts; and the court pronounced judgment of fine and imprisonment, as for a common riot.—(Christian's Blackstone)

(*h*) Staundf. P. C. 38; 3 Inst. 140, 141; Hawk. b. 1, c. 21, s. 3. So it is laid down that a *rescue* of a prisoner from any of the said courts, without striking a blow, is punishable with perpetual imprisonment and forfeiture of goods, and of the profits of lands during life; but as no actual blow is given, the amputation of the hand is excused. (4 Bl. Com. p. 125.) See as to *rescue* in other cases, post, p. 296.

(*i*) Harrison's case, Cro. Car. 503. As to the power of the court itself, against which the contempt is committed, to punish it in a summary way, vide sup. vol. III. p. 364; et post, c. XV.

[judges there sitting; as by the steward in a court leet, or the like (*k*).]

III. Another species of offence,—somewhat allied to the last,—is that of *intimidation, or other improper demeanor, practised towards the parties or witnesses in a court of justice.* [As if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty (*l*):] or if a man endeavours to dissuade a witness from giving evidence, or to disclose an examination before the privy council, or advises a prisoner to stand mute;—these are all impediments to justice, are high misprisions and contempts of the king's courts, and are punishable with fine and imprisonment. Antiently, indeed, it was held, [that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made an accessory to the offence, if felony, and, in treason, a principal; and at this day it is agreed that he is guilty of a high misprision (*m*), and liable to be fined and imprisoned (*n*).]

So as regards the jurors, the offence may be committed, which is described in the books as *embracery;* that is, [attempting to influence them corruptly to one side, by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for this misdemeanor in the person embracing and the juror embraced is,] by the common law,—and also by statute 6 Geo. IV. c. 50, s. 61,—fine and imprisonment (*o*).

(*k*) Hawk P. C. b. 1, c. 21, s. 11.

(*l*) 3 Inst. 141, 142. Blackstone remarks (vol. iv. p. 126), that these offences, when they proceeded further than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods, and cites Stiernh. de Jure Goth. l. 3, c. 2.

(*m*) See Barr. on Statutes, 212; 27 Ass. Pl. 44, s. 4, fol. 138.

(*n*) Hawk. P. C. b. 1, c. 21, s. 15.

(*o*) The false verdict of jurors, whether occasioned by embracery or not, was antiently considered as criminal; and therefore severely punished by means of the writ of

IV. A fourth offence of the same general character is, *obstructing a lawful arrest, or, generally, the execution of lawful process.* [This is, at all times, an offence of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an arrest upon criminal process: and it hath been holden that the party opposing such arrest, becomes thereby *particeps criminis;* that is, an accessory in felony, and a principal in treason (*p*). Formerly one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places,—especially in London and Southwark,—where indigent persons assembled together to shelter themselves from justice,—under the pretext of their having been antient palaces of the Crown or the like (*q*); all of which sanctuaries for iniquity are now demolished, and the opposing of any process therein made highly penal, by the statutes 8 & 9 Will. III. c. 27; 9 Geo. I. c. 28; 11 Geo. I. c. 22;] and 1 Geo. IV. c. 116: which enacted, [that persons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavour to execute his duty therein, so that he receives bodily hurt;] and all persons aiding and abetting such opposition; should be felons, and liable to transportation. The principal enactments, however, as regard the offence now under consideration, are those of 9 Geo. IV. c. 31 (*r*), and 7 Will. IV. & 1 Vict. c. 85; by the former of which it is provided, that where any person shall be convicted of any assault upon any peace officer, or revenue officer, in the due execution of his duty, or upon any person acting in aid of such officer; or of any assault upon any person,

attaint. (See 3 Bl. Com. pp. 388, 402; 6 Geo. 4, c. 50, s. 60; sup. vol. III. p. 632, n. (*c*).

(*p*) Hawk. P. C. b. 2, c. 17, s. 1.

(*q*) Such as *White Friars*, and its environs; the *Savoy;* and the *Mint*, in Southwark. Some further information on the subject of the law of sanctuary will be found, post, c. XXI.

(*r*) This statute repeals a former provision on this subject contained in 1 & 2 Geo. 4, c. 88.

with intent to resist or prevent the lawful apprehension or detainer of the person so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained;—such assault shall be a misdemeanor, punishable with fine or by imprisonment, with or without hard labour, for any term not exceeding two years (s). And by the latter statute, that whosoever shall unlawfully and maliciously shoot at any person; or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person; or shall stab, cut or wound any person;—with intent, in any of such cases, to resist or prevent the lawful apprehension or detainer of any person;—shall be guilty of felony (t): and he is punishable with penal servitude for life, or not less than fifteen years; or with imprisonment, with or without hard labour and solitary confinement, for not more than three years (u).

V. [An *escape* of a person,] lawfully arrested for crime (whether felony or misdemeanor), by gaining his liberty before he is delivered by course of law, [is also an offence against public justice (x). And the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner,—the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice (y). Officers, therefore, who after arrest *negligently* permit a felon to escape,

(s) 9 Geo. 4, c. 31, s. 25, and see 14 & 15 Vict. c. 19, s. 12, as to obstructing apprehension for offences under that Act; et vide sup. pp. 152, 163, 166.

(t) 7 Will. 4 & 1 Vict. c. 85. s. 4.

(u) 7 Will. 4 & 1 Vict. c. 85, s. 4; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to the offence of cutting and stabbing, generally, vide sup. p. 150.

(x) Hawk. P. C. b. 2, c. 17, s. 3; c. 19, ss. 2, 3. As to evidence of escape, breach of prison, and rescue, see 4 Geo. 4, c. 64, s. 44.

(y) As to breach of prison by the prisoner, vide post, p. 295.

[are punishable by fine (*z*); but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence: for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody; whether treason, felony, or trespass. And this, whether he were actually committed to gaol, or only under a bare arrest (*a*). But the officer cannot be thus punished] as for felony (*b*), [till the original delinquent hath actually received judgment; or been attainted upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested; otherwise it might happen that the officer might be punished for felony, and the person arrested and escaping might turn out to be an innocent man. But before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor,] and may be kept to hard labour besides (*c*). We may add here, that an escape permitted by a private person, is an offence of the same description as one permitted by an officer. For if any person has another in his lawful custody, as for crime committed, and suffers him to escape before he is delivered over to the proper authority, such person is liable to the same punishment as already stated in the case of a gaoler or other officer (*d*).

VI. [*Breach of prison* by the prisoner himself, when

(*z*) 1 Hale, P. C. 600.

(*a*) 1 Hale, P. C. 590; Hawk. P. C. b. 2, c. 19, s. 22.

(*b*) It is said, however, he is punishable, in the case of *treason*, where the party escaping has been actually guilty of treason, whether he has been attainted of it or not. Hawk. P. C. b. 2, c. 19, s. 26.

(*c*) 14 & 15 Vict. c. 100, s. 29.

(*d*) Hawk. P. C. b. 2, c. 20, s. 6. As to escapes from Pentonville, Millbank, and Parkhurst Prisons, see 1 & 2 Vict. c. 82, ss. 12, 13; 5 & 6 Vict. c. 29, s. 24; 6 & 7 Vict. c. 26, s. 22. As to the apprehension of persons escaping from England to Scotland, and *vice versâ*, vide 13 Geo. 3, c. 31. As to escapes to and from Ireland, 44 Geo. 3, c. 92, s. 3.

[committed for any cause, was felony at the common law (*e*); or even conspiring to break it (*f*). But this severity is mitigated by the statute *de frangentibus prisonam*, (1 Edw. II. st. 2,) which enacts, that no person shall have judgment of life or member for breaking prison, unless committed for some capital offence (*g*). But to break prison (*h*) and escape (*i*), when lawfully committed for any treason or felony, remains still felony as at the common law:] and is now punishable with penal servitude for not more than seven or less than three years; or imprisonment, with or without hard labour and solitary confinement, not exceeding two years (*k*). [And to break prison, whether it be a county gaol or other usual place of security, when lawfully confined upon any other inferior charge, is still punishable as a high misdemeanor by fine and imprisonment: for the statute which ordains that such offence shall be no longer capital, never meant to exempt it entirely from every degree of punishment (*l*).] And to escape from confinement under sentence or order of penal servitude, is punishable by penal servitude for life; and previous imprisonment, with or without hard labour, for any term not exceeding four years (*m*).

VII. [*Rescue* is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing, as it would have been in a gaoler to have *voluntarily* permitted an

(*e*) 1 Hale, P. C. 607; R. *v.* Haswell, R. & R. C. C. R. 458.

(*f*) Bract. l. 3, tr. 2, c. 9.

(*g*) 1 Hale, P. C. 609.

(*h*) This offence implies in every case an actual and forcible breaking; and if a man goes out of prison by a door left open, it seems to be an escape only. Hawk. P. C. b. 2, c. 18, s. 8.

(*i*) It seems that if the prisoner do not actually escape, a mere breach of prison is no felony. Hawk. P. C. b. 2, c. 18, s. 11.

(*k*) 7 & 8 Geo. 4, c. 28, ss. 8, 9; 1 Vict. c. 90, s. 5; 14 & 15 Vict. c. 100, s. 29; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*l*) Hawk. P. C. b. 2, c. 18, s. 20.

(*m*) 5 Geo. 4, c. 84, s. 22; 4 & 5 Will. 4, c. 67; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

[escape (*n*). A rescue therefore of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also (*o*).] And if the rescuer be convicted of felony, he shall be liable in certain cases to penal servitude for not more than seven or less than three years; or to be imprisoned, with or without hard labour, for not less than one and not more than three years (*p*). [But here likewise,—as for voluntary escapes,—the principal must first be attainted or receive judgment, before the rescuer can be punished] as for felony: [and for the same reason; because perhaps in fact it may turn out that there has been no offence committed (*q*).] Yet even before the attainder of the principal, the rescuer may be prosecuted at the discretion of the Crown, as for a misprision (*r*). By 25 Geo. II. c. 37, s. 9, if any person shall rescue, or attempt to rescue, out of prison a person committed for murder, or found guilty of murder; or rescue, or attempt to rescue, any person convicted of murder, while going to execution or during execution,—the person so offending shall be deemed guilty of felony: and the punishment is penal servitude for life, or not less than fifteen years; or imprisonment, with or without hard labour and solitary confinement, for not more than three years (*s*). By 52 Geo. III. c. 156, every person assisting a prisoner of war to escape, shall be guilty of felony: the punishment being penal servitude for life, fourteen, seven, or not less than three years (*t*). By 4 Geo. IV. c. 64, (an Act for consolidating and amending the laws relative to the regulations of certain gaols and houses of correc-

(*n*) Hawk. P. C. b. 2, c. 21.

(*o*) It is a misdemeanor in the rescuer, though the person rescued be confined for debt only, and not on any criminal charge. R. *v.* Allan, 1 Car. & M. 295.

(*p*) 1 & 2 Geo. 4, c. 88; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to rescue, see R. *v.* Stanley, R. & R. C. C. R. 432.

(*q*) 1 Hale, P.C. 598, 607; Fost. 344.

(*r*) Hawk. P. C. b. 2, c. 21, s. 8.

(*s*) 25 Geo. 2, c. 37, s. 9; 7 Will. 4 & 1 Vict. c. 91; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*t*) 52 Geo. 3, c. 156; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to this offence, vide R. *v.* Martin, R. & R. C. C. R. 196.

tion in England and Wales,) if any person shall by any means whatever aid and assist any prisoner to escape, or attempting to escape, from any prison,—such offender, whether an escape be actually made or not, shall be guilty of felony: the punishment being penal servitude for a term not exceeding fourteen years (*u*). And whoever shall rescue, or attempt to rescue, any offender under sentence or order of penal servitude (*v*), from the custody of any person charged with his removal; or shall convey to such offender any disguise, or instrument for effecting escape, or arms; shall be punishable with penal servitude for life, and previous imprisonment, with or without hard labour, not exceeding four years (*x*). And, lastly, by 14 & 15 Vict. c. 100, s. 29, if any person shall be convicted of any rescue from lawful custody on a criminal charge, he shall be liable not only to be imprisoned for any term warranted by law, but to be kept to hard labour during the whole or any part of such term.

VIII. Another offence of this class, is [that of *taking a reward under pretence of helping the owner to his stolen goods.* This was a contrivance carried to a great length of villany in the reign of George the first, the confederates of the felons thus disposing of stolen goods, at a cheap rate, to the owners themselves, and thereby stifling all further inquiry. The famous Jonathan Wild had under him a well-disciplined corps of thieves, who brought in all their spoils to him; and he kept a sort of public office, for restoring them to the owners at half price. To prevent

(*u*) 4 Geo. 4, c. 64, s. 43; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. (See Holloway *v.* The Queen, 17 Q. B. 317.) There is also a statute of 16 Geo. 2, c. 31, relative to the offence of aiding prisoners to escape; but it is repealed by 4 Geo. 4, c. 64, s. 1, so far as relates to the escape of any prisoner from any prison to which the latter act extends.

(*v*) The expression used in 5 Geo. 4, c. 84, is "transportation or banishment;" but see 20 & 21 Vict. c. 3, s. 6.

(*x*) 5 Geo. 4, c. 84, s. 22; 4 & 5 Will. 4, c. 67; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

[which audacious practice,—to the ruin, and in defiance, of public justice,—it was enacted by 4 Geo. I. c. 11, that whosoever shall take a reward under the pretence of helping any one to stolen goods, shall suffer as the felon who stole them; unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against him. Wild, still continuing in his old practice, was, upon this statute, at last convicted and executed.] These provisions, indeed, have been since repealed by 7 & 8 Geo. IV. c. 27, s. 1; but by a statute passed in the same session, they were re-enacted, with such improvements as were calculated for the more effectual prevention of the offence. For by 7 & 8 Geo. IV. c. 29, s, 58, it is provided, that every person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, or converted, as in the Act mentioned,—shall, unless he cause the offender to be apprehended and brought to trial for the same, be guilty of felony: and the punishment is penal servitude for life or for not less than three years, or imprisonment, with or without hard labour and solitary confinement, for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall so think fit, in addition to such imprisonment (*x*).

IX. The offence of *compounding of felony*, is the taking of a reward for forbearing to prosecute an offence of that description; and one kind of it, (known in the books by the more antient appellation of *theft-bote*,) is where a party robbed [takes his goods again, or other amends, upon agreement not to prosecute. This was formerly held to

(*x*) 7 & 8 Geo. 4, c. 29, s. 58; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to this offence, vide R. *v.* Stone, 4 Car. & P. 379; R. *v.* Daly, 9 Car. & P. 342.

[make a man accessory, but is now punished only with fine and imprisonment (*y*). This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law—"*latroni eum similem habuit, qui furtum celare vellet, et occulte sine judice compositionem ejus admittere*" (*z*).] By statute 7 & 8 Geo. IV. c. 29, s. 59, even to advertise a reward for the return of any property stolen or lost, and in such advertisement to use any words purporting that no questions will be asked, or purporting that a reward will be paid for any lost or stolen property, without seizing or making inquiry after the person producing the same; or promising in such advertisement to return to any pawnbroker or other person the money he may have advanced upon or paid for such property, or any other reward for the return of the same;—subjects the advertiser, printer, and publisher to a forfeiture of fifty pounds each (*a*).

X. Besides the last described offence, the mere concealment of a felony is by our law criminal; and is described, in the books, as *misprision of felony*. This is the concealment of a felony, (short of treason, the misprision of which has been before considered (*b*),) committed by another; but without such previous concert with, or subsequent assistance of, the person committing the felony, as will make the party concealing an accessory before or after the fact: [and the punishment of this in a public officer, (by the statute Westminster the first, 3 Edw. I. c. 9,) is imprisonment for a year and a day; in a common person, imprisonment for a less, but discretionary, time; and, in both, fine and ransom at the king's pleasure;] an expression which, as Sir W. Blackstone remarks (*c*), signifies here (as in other cases where it occurs,) not [any extrajudicial will of the

(*y*) Hawk. P. C. b. 1, c. 59, s. 6.

(*z*) Stiern. de Jure Goth. l. 3, c. 5.

(*a*) There is a similar provision in the particular case of advertising a reward for lost or stolen *dogs*, contained in 8 & 9 Vict. c. 47.

(*b*) Vide sup. p. 234.

(*c*) 4 Bl. Com. p. 121.

[sovereign; but such as is declared by his representatives, the judges in his courts of justice—"*voluntas regis in curiâ, non in camerâ*" (*d*).]

XI. *Compounding of informations upon penal statutes, or of misdemeanors*, is also illegal.

As to the first of these, the compounding of *informations upon penal statutes*, [it i sa misdemeanor against public justice, by contributing to make the laws odious to the public. At once, therefore to discourage malicious informers, and to provide that offences, when discovered, shall be duly prosecuted,—it is enacted by 18 Eliz. c. 5,] (altered, as to the punishment, by the effect of 56 Geo. III. c. 138,) [that if any person informing, under pretence of any penal law, makes any composition without leave] of one of the courts at Westminster; [or takes any money or promise from the defendant to excuse him; (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not the public good),—he shall forfeit 10*l*.,] and suffer such imprisonment or additional fine, or both, as the court shall award, [and shall be for ever disabled to sue on any popular or penal statute (*e*).]

As to compounding *misdemeanors*: such a proceeding, without leave of one of the courts at Westminster, seems to be also illegal (*f*). But [it is not uncommon when a person is convicted of a misdemeanor more immediately affecting an individual,—as a battery, imprisonment or the like,—for the court to permit the defendant to *speak with the prosecutor*, before any judgment is pronounced: and if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor his expenses, and make him some pri-

(*d*) 1 Hale, P. C. 375.

(*e*) As to this offence, see R. *v.* Best, 9 Car. & P. 368; R. *v.* Crisp, 1 B. & A. 282.

(*f*) See Collins *v.* Blantern, 2 Wils. 341; Edgecombe *v.* Rodd, 5 East, 297; Keir *v.* Leeman, 9 Q. B. 371; 4 Bl. Com. 136, note by Christian.

[vate amends, without the trouble and circuity of a civil action (*g*).]

XII. [*Common barratry* (*h*) is the offence of *frequently* (*i*) inciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise (*k*). The punishment for this offence, in a common person, is by fine and imprisonment; but if the offender, (as is too frequently the case,) belongs to the profession of the law, a barrator, who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. And indeed, it is now enacted, that if any one who hath been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney, solicitor or agent in any suit, the court, upon complaint, shall examine it in a summary way, and, if proved,] may direct the offenders to be kept in penal servitude for not more than seven or less than three years (*l*).

[Hereunto also may be referred another offence of equal malignity and audaciousness, that of suing another in the name of a fictitious plaintiff,—either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by 8 Eliz. c. 2, s. 4, to be punished by six months' imprisonment, and treble damages to the party injured.]

(*g*) Blackstone expresses a disapprobation of this practice, as contrary to the true policy of criminal jurisprudence. Even a voluntary forgiveness by the party injured "ought not," he says, "in true policy "to intercept the stroke of justice." —4 Bl. Com. 364.

(*h*) This is said to be a forensic term borrowed from the Normans: the Anglo-Norman *baret* signifying a quarrel or contention. See the notes to Bac. Abr. tit. Barratry (A).

(*i*) One act is not sufficient, R. *v.* Harkwicke, 1 Sid. 282; R. *v.* Hannon, 6 Mod. 311; Hawk. P. C. b. 1, c. 81, s. 5.

(*k*) Hawk. P. C. b. 1, c. 81, s. 1.

(*l*) 12 Geo. 1, c. 29; 21 Geo. 2, c. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. In the Attornies' Act, 6 & 7 Vict. c. 73, the statute 12 Geo. 1, c. 29, is recognized as existing, and is left unrepealed.

XIII. [*Maintenance* is an offence that bears a near relation to the former; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it (*m*): a practice that was greatly encouraged by the first introduction of uses (*n*). This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression (*o*). And therefore by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or to do any act to support another's law suit, by money, witnesses, or patronage (*p*) A man may, however, maintain the suit of his near kinsman (*q*), servant (*r*), or poor neighbour (*s*), out of charity and compassion, with impunity;] or he may maintain a suit in which he has any interest, actual or contingent (*t*): [otherwise the punishment by common law,] and also by statute 1 Ric. II. c. 4, [is fine and imprisonment (*u*), and by statute 32 Hen. VIII. c. 9, a forfeiture of ten pounds.]

XIV. [*Champerty* (*campi partitio*) is a species of maintenance, and punished in the same manner (*x*),—being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if

(*m*) Hawk. P. C. b. 1, c. 83, s. 23.

(*n*) Dr. and Stud. 203. As to uses, vide sup. vol. I. p. 354.

(*o*) Co. Litt. 368 (b); 2 Inst. 208, 212, 213; Hawk. P. C. ubi sup. Maintenance may consist, (according to Bacon in his Ab. tit. Maintenance,) not only in the officious intermeddling in suits as described by Blackstone (vol. iv. p. 135), which is termed *curialis;* but also in assisting another to his pretensions to lands, or holding them for him by force or subtilty, or stirring up quarrels in the county, in relation to matters wherein one is no way concerned. And this species is known by the name of *ruralis*.

(*p*) Ff. 48, 10, 28.

(*q*) Bac. ubi sup.; Hawk. ubi sup. s. 26.

(*r*) Hawk. ubi sup. ss. 31, 32, 33.

(*s*) Bro. Abr. tit. Maintenance, (14).

(*t*) Hawk. P. C ubi sup. ss. 14, 15; Master *v*. Miller, 4 T. R. 340; Williamson *v*. Henley, 6 Bing. 299.

(*u*) Hawk. P. C. ubi sup. s. 38; 2 Inst. 208.

(*x*) Hawk. P. C. b. 1, c. 84, s. 1.

[they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense (*y*). Thus *champart*, in the French law, signifies a similar division of profits; being a part of the crop, annually due to the landlord by bargain or custom. In our sense of the word, it signifies the purchasing of a suit or right of suing; a practice so much abhorred by our law, that it is one main reason why a *chose in action*, or thing of which one hath the right, but not the possession, is not assignable at common law (*z*); because no man should purchase any pretence to sue in another's right. These pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted upon by the Roman law, "*qui improbè coëunt in alienam litem, ut quicquid ex condemnatione in rem ipsius reductum fuerit inter eos communicaretur, lege Juliâ de vi privatâ tenentur*" (*a*); and they were punished by the forfeiture of a third part of their goods and by perpetual infamy (*b*). Hitherto must also be referred the provisions of the statute 32 Hen. VIII. c. 9, that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder,—on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor (*c*).]

(*y*) Statute of Conspiracy, 33 Edw. 1, st. 2.

(*z*) As to this, vide sup. vol. II. p. 44.

(*a*) Ff. 48, 7, 10.

(*b*) There are on the subject of champerty the following statutes of antient date:—3 Edw. 1, c. 25; 13 Edw. 1, c. 49; 21 Edw. 1, stat. 3, c. 11; 33 Edw. 1, st. 3; 4 Edw. 3, c. 11. See also the following cases as to what amounts to maintenance and champerty: Stevens *v.* Bagwell, 15 Ves. jun. 139; Williams *v.* Protheroe, 5 Bing. 309; Stanley *v.* Jones, 7 Bing. 369; Bell *v.* Smith, 5 B. & C. 188; In re Masters, 1 Har. & Woll. 348.

(*c*) As to this statute, see Cholmondeley *v.* Clinton, 4 Bligh, N. S. 4.

XV. *Conspiracy* may be correctly described, in general, as a combination or agreement between several persons to carry into effect a purpose hurtful to some individual; or to particular classes of the community; or to the public at large (*d*): though this is subject to exception in the case where the purpose is a felonious one, and actually accomplished;—the offence of conspiracy, (which is a misdemeanor only,) being then merged in the felony (*e*). Thus there may be conspiracy to seduce a female (*f*); to injure the public health by selling unwholesome provisions (*g*); to raise the funds by the propagation of false intelligence (*h*); to defraud some person or persons of his or their property (*i*); and the like (*k*). But one of the chief species of this offence, (and that which reduces it under the present chapter,) is that of conspiring [to indict an innocent man falsely and maliciously; who is accordingly indicted and acquitted,] or otherwise lawfully discharged from the prosecution (*l*). This is [an abuse and perversion of public justice; for which the party injured, may either have a civil action, (the nature of which we have described in a

(*d*) It has been frequently said to consist either of an agreement for an unlawful purpose, or to effect a lawful purpose by unlawful means. (R. *v.* Seward, 1 A. & R. 713; R. *v.* Jones, 4 B. & Ad. 349) But the correctness of the antithesis has been questioned on high authority, (R. *v.* Peck, 9 A. & E. 686;) and it is clear that the terms *lawful* and *unlawful*, as here used, themselves require a definition. In many cases, too, it is difficult to distinguish precisely between the *purpose* and the *means*, in cases of conspiracy. As to the nature of this offence, see also Reg. *v.* Carlisle, 1 Dearsley's C. C. R. 337.

(*e*) See also another exception, infra, n. (*l*).

(*f*) See R. *v.* Grey, 3 St. Tr. 519; R. *v.* Delaval, 3 Burr. 1434.

(*g*) See R. *v.* Mackarty and Fordenbourgh, 2 Ld. Raym. 1179; 2 East, P. C. c. 18, s. 5; 6 East, 133.

(*h*) See R. *v.* De Beranger, 3 M. & S. 67.

(*i*) See Queen *v.* Gompertz and others, 9 Q. B. 824.

(*k*) Hawk. P. C. b. 1, c 72, s. 2.

(*l*) Hawk. P. C. b. 1, c. 72, ss. 2, 9; 3 Inst. 143; see R. *v.* Spragg, 2 Burr. 998; R. *v.* Macdaniel, 1 Leach, C. C. 45. We may remark here, that if several persons conspire to accuse, or to threaten to accuse, of crime *with intent to extort property*, it amounts not merely to the misdemeanor of conspiracy, but, by the express provisions of the statute law, to felony. Vide sup. pp. 197, 198.

[former book (*m*); or the conspirators, (for there must be at least two to form a conspiracy,) may be indicted at the suit of the Crown; and were by the antient common law (*n*) to receive what was called the villenous judgment: viz., to lose their *liberam legem*,] (whereby they were formerly discredited and disabled as jurors and witnesses); [to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison (*o*). But it is now the better opinion that the villenous judgment is by long disuse become obsolete, it not having been pronounced for some ages (*p*); but instead thereof, the defendants are usually sentenced] to fine and imprisonment (*q*); to which, by 14 & 15 Vict. c. 100, s. 29, is now added, (in most cases of conspiracy,) hard labour, during the whole or any part of the term of imprisonment.

With respect to the offence of conspiracy, it may be remarked, that it is deemed to consist rather in the guilty combination or agreement, than in the act by which it is carried into effect; and therefore, in an indictment for conspiring to do a thing in itself unlawful, it is not necessary to allege that the thing was in fact done (*r*); though, supposing it to have been done, it is usual to state the unlawful agreement or conspiracy first, and then to charge the thing done, (or overt act, as it is called,) to have been committed in pursuance of the conspiracy (*s*). It is also observable, that the effect of the state of the law relative to conspiracy, is often to render a purpose criminal when con-

(*m*) Vide sup. vol. III. p. 470.

(*n*) Bro. Abr. tit. Conspiracy, 28.

(*o*) Hawk. P. C. b. 1, c. 72, s. 9.

(*p*) It is to be observed in reference to this subject, that until a recent period persons who were *infamous*, that is, of such a character that they might be challenged as jurors *propter delictum* (as to this vide sup. vol. III. p. 601), were, independently of any villenous judgment, inadmissible as witnesses; but they are now made competent by 6 & 7 Vict. c. 85. Vide sup. vol. III. p. 608.

(*q*) Blackstone adds "pillory," but this punishment is now abolished. Vide post, p 310, n. (*o*).

(*r*) 9 Rep. 56 b; R. *v.* Kimberty, 1 Lev. 62; R. *v.* Best, Lord Raym. 1167; S. C. Salk. 174; R. *v.* Seward, 1 A. & E. 713.

(*s*) As to the form of the indictment, see R. *v.* Steel, 1 C. & M. 337.

certed by several, which would not be of that character, if entertained merely by an individual; a distinction which rests on very solid ground; for though every wrong may not be of dangerous tendency to the public, yet every coalition to promote wrong, is manifestly of that character. Accordingly it is held, that a false and malicious indictment, if preferred by an individual, is no crime, though it is a cause of civil action (*t*); but if planned by several persons, it is, as we have seen, the legal offence of conspiracy. So a combination among workmen, to raise the price of wages, was once deemed to be in every case conspiracy (*u*); though the same object, if contemplated by a single workman, would not have been criminal (*x*): but the law on this subject is now altered; for by 6 Geo. IV. c. 129, s. 4, persons merely consulting and agreeing among themselves being present together, what hours they will work or what wages they will receive, are not to be deemed liable to prosecution, any law or statute to the contrary notwithstanding.

XVI. The next offence against public justice is that of *perjury*; which is defined by Sir E. Coke (*y*) "to be a "crime committed, when a lawful oath is ministered by "any that hath authority, to any person, in any judicial "proceeding, who sweareth absolutely and falsely, in a "matter material to the issue or cause in question." The common law [takes no notice of any perjury, but such as is committed in some court of justice having power to administer an oath; or before some magistrate, or proper officer, invested with a similar authority; in some proceedings relative to a civil suit or a criminal prosecution; for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them:] but by the express provision of many modern statutes (*z*), it is enacted

(*t*) Leith *v.* Pope, 2 Bl. Rep. 1328; see 2 Russ. on Crimes, p. 674.

(*u*) See R. *v.* Ridgeway, 5 B. & Ald. 527.

(*x*) R. *v.* Tailors of Cambridge, 8 Mod. 10.

(*y*) 3 Inst. 164.

(*z*) The following statutes contain provisions as to perjury in particular cases: Government An-

that a false oath taken in certain cases, not of a judicial kind, shall be deemed to amount to perjury, and be visited with the same penalties (*a*).

A mere voluntary oath, however,—that is, an oath administered in a case for which the law has not provided,—is not one on which perjury can be assigned; for as such a proceeding is not required, so neither is it protected by the law. Indeed, such voluntary oaths are now expressly prohibited by statute 5 & 6 Will. IV. c. 62; which provides, that a certain form of declaration may be substituted for them, and that any party falsely making such declaration shall be guilty of a misdemeanor.

Perjury, by the definition, must be *absolute*, as well as false,—that is, it must be in positive terms. Yet a man will be guilty of the offence, if he swears that he believes to be true, that which he knows to be false (*b*). Perjury must also be *corrupt* or *wilful*, (that is, [committed *malo animo*,) not upon surprise or the like (*c*). It must also be,

nuities, 48 Geo. 3, c. 142, ss. 4, 26; 52 Geo. 3, c. 129, ss. 2, 7;—Exchequer Bills, 51 Geo. 3, c. 15, ss. 9, 10;—Stamps, 55 Geo. 3, c. 184, ss. 52, 53;—Customs, 3 & 4 Will. 4, c. 51, ss 28, 29; --Excise, 7 & 8 Geo. 4, c. 53, ss. 29, 30, 31;—Naval stores, 39 & 40 Geo. 3, c. 89, s. 36;—Quarantine, 6 Geo. 4, c. 78, s. 29;—Pilotage, 6 Geo. 4, c. 125, s. 80;—Vessels carrying passengers, 43 Geo. 4, c. 56, s 20;—Bankrupts, 12 & 13 Vict. c. 106, s. 254;—Insolvents, 7 Geo. 4, c. 57, s. 71; 1 & 2 Vict. c. 110, s. 100;—Registry Acts, 2 & 3 Ann. c. 4, ss 18, 19;—Inclosure Act, 41 Geo. 3, c 109, s 43;—Elections, 2 Will. 4, c. 45, s. 58; 5 & 6 Will. 4, c. 76, s. 34;—Naval and Military pay, &c., 11 Geo. 4 & 1 Will. 4, c. 20, ss. 85, 86; 7 Geo. 4, c. 78, s. 29;—Slave trade, 5 & 6 Vict. c. 42, s. 7;—Oaths sworn abroad, 6 Geo. 4, c. 87; 18 & 19 Vict. c. 42;—Court of Probate, &c., 20 & 21 Vict. c 77, s. 27;—Court for Divorce and Matrimonial Causes, 20 & 21 Vict. c. 85, s. 50.

(*a*) We may remark here, that the penalties of perjury attach, by the express provisions of the statute law, to wilful falsehood in the *affirmation* without oath, allowed to be made by *Quakers*, *Moravians*, and *Separatists*:—(see 7 & 8 Will. 3, c. 34; 22 Geo. 2, c. 46, ss. 36, 37; 22 Geo. 3, c. 30; 9 Geo. 4, c. 32; 3 & 4 Will. 4, cc. 49, 82; 1 & 2 Vict. c. 77; 6 & 7 Vict. c. 85, s. 2;) or by persons called as witnesses allowed to affirm instead of to make oath, under 17 & 18 Vict. c. 125, s. 20. And the case is the same as to the *declaration* of *bankrupts*, without oath. (As to which vide 12 & 13 Vict. c. 106, s. 254)

(*b*) Pedley's case, 1 Leach, C. C. 365.

(*c*) Hawk. P. C. b. 1, c. 69, s. 2.

[in some point, *material* to the question in dispute (*d*); for if it only be in some trifling collateral circumstance, to which no regard is paid,] it is no more penal than in the voluntary extra-judicial oaths before mentioned.

[*Subornation* of perjury, is the offence of procuring another to take such a false oath, as constitutes perjury in the principal (*e*).]

Perjury and subornation are both misdemeanors (*f*); and their punishment, [at common law, has been various. It was anticntly death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment.] But additional punishments for this offence, have been enacted by various statutes. By 5 Eliz. c. 9, (made perpetual by 29 Eliz. c. 5, s. 2, and 21 Jac. I. c. 28, s. 8,) the offender, if convicted of perjury, may be imprisoned for six months and fined 20*l.*; and if convicted of subornation may be fined 40*l.*, and in default of payment, is liable to imprisonment for six months. He may also, in either case, be sent to the house of correction, with hard labour for seven years (*g*); or be sentenced to penal servitude for not more than seven or less than three years (*h*). And by 3 Geo. IV. c. 114, the offender may be sentenced to imprisonment, with hard labour, for any term for which he may be lawfully imprisoned; either in addition to or in lieu of any other punishment (*i*).

[It has been sometimes wished that perjury, at least upon capital accusations, whereby another's life has been or might have been destroyed, was also rendered capital, upon

(*d*) R. *v.* Aylett, 1 T. R. 69; see Queen *v.* Bennett, 20 L. J. (M. C.) 217; Queen *v.* Phillpotts, 21 L. J. (M. C.) 18.

(*e*) If the party suborned does not actually take an oath, the person inciting him so to do is liable to be fined and suffer infamous corporal punishment. Hawk. P. C. b. 1, c. 69, s. 2.

(*f*) As to the *indictment* for these offences, and the provision of 14 & 15 Vict. c. 100, ss. 20, 21, 22, relative thereto, vide post, c. XVIII.

(*g*) 2 Geo. 2, c. 25, s. 2.

(*h*) 2 Geo. 2, c. 25, s. 2; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*i*) By 14 & 15 Vict. c. 100, s. 19, any court has, in general, the power of directing any witness to be prosecuted for perjury, in regard to the evidence he has given.

[a principle of retaliation (*k*);] and indeed, [where the death of an innocent person has been actually the consequence of such wilful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment; which our antient law in fact inflicted (*l*). But the mere *attempt* to destroy life, by other means, not being] in general (*m*) [capital, there is no reason that an attempt by perjury should; much less that this crime should in *all* judicial cases be punished with death. For to multiply capital punishments lessens their effect, when applied to crimes of the deepest dye; and detestable as perjury is, it is not by any means to be compared with some other offences, for which only death can be inflicted: and therefore it seems already, (except perhaps in the instance of deliberate murder by perjury,) very properly punished by our present law; which has adopted the opinion of Cicero (*n*), derived from the law of the Twelve Tables, "*perjurii pœna divina, exitium; humana, dedecus* (*o*)."]

XVII. *Bribery*, is the next species of offence against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office (*p*). In the [East, it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries, where

(*k*) Blackstone adds (vol. iv. p. 138), "as it is in all cases by the "laws of France."

(*l*) Britton, c. 5. As to the present state of the law on this subject, vide sup. p 139, n. (*z*).

(*m*) Vide sup. p. 148.

(*n*) De Leg. 2, 9.

(*o*) Until recently the punishment of the *pillory*, which had been abolished in all other cases by 56 Geo. 3, c. 138, was retained for the punishment of perjury and subornation. But it is now altogether abolished by 7 Will. 4 & 1 Vict. c. 23. Another consequence that attended a conviction for this crime, until a recent period, was a perpetual disability to bear testimony; but by statute 6 & 7 Vict. c. 85, the law with respect to the incompetency of witnesses, on the ground of crime, is altered. Vide sup. vol. III. p. 608; sup. p. 306, n. (*p*).

(*p*) 3 Inst. 145; Hawk. P. C. b. 1, c. 67.

[the true principles of government are never understood: and it is imagined that there is no obligation from the superior to the inferior; no relative duty owing from the governor to the governed. The Roman law, though it contained many severe injunctions against bribery, as well for selling a man's vote in the senate or other public assembly, as for the bartering of common justice; yet, by a strange indulgence in one instance, it tacitly encouraged this practice; allowing the magistrate to receive small presents, provided they did not in the whole exceed one hundred crowns in a year (*q*),—not considering the insinuating nature and gigantic progress of this vice when once admitted. Plato, therefore, more wisely, in his ideal republic (*r*), orders those who take presents for doing their duty, to be punished in the severest manner; and by the laws of Athens, he that offered was also prosecuted, as well as he that received a bribe (*s*). In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same (*t*). But in judges, especially the superior ones, it hath been always looked upon] as particularly heinous; and there is even a tradition that in the reign of Edw. III. a chief justice (Thorpe) was hanged for this offence (*u*). [By a statute of the eleventh year of Henry the fourth (*x*), all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe; be punished at the king's will; and be discharged from the king's service for ever. And some notable examples have been

(*q*) Ff. 18, 11, 6.

(*r*) De Leg. l. 12.

(*s*) Pott. Antiq b. 1, c. 23.

(*t*) 3 Inst. 147.

(*u*) Blackstone (vol. iv. p. 140) says he was actually hanged; but Lord Coke (3 Inst. 145) denies that Thorpe was hanged, or could be hanged, for this offence; and Lord Campbell, in his Lives of the Chief Justices (vol. i. p. 91), considers the tradition, that sentence of death was actually passed on him, to be unfounded; and to have been invented by Oliver St. John in inveighing against the judges, who, in the reign of Charles I., decided in favour of the legality of ship-money.

(*x*) Vide 3 Inst. 147.

[made in parliament, of persons in the highest stations, and otherwise very eminent and able, but contaminated with this sordid vice (*y*).]

XVIII. [Another misdemeanor of the same species, is the *negligence of public officers* intrusted with the administration of justice,—as sheriffs, coroners, constables, and the like,—which makes the offender liable to be fined: and, in very notorious cases, will amount to a forfeiture of his office, if it be a beneficial one (*z*).]

XIX. [There is yet another offence against public justice, which is a] misdemeanor [of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the *oppression*, and *tyrannical partiality*, of judges, justices, and other magistrates, in the administration and under the colour of their office. However, when prosecuted,—either by impeachment in parliament, or by information in the Court of Queen's Bench, (according to the rank of the offenders,) it is sure to be severely punished with forfeiture of their offices, (either consequential or immediate); together with fines, imprisonment, or other discretionary censure, regulated by the nature and aggravations of the offence committed (*a*).]

XX. [Lastly, *extortion* is an abuse of public justice; which consists in any officer's unlawfully taking, by colour

(*y*) As to the offence of bribery and corruption at *parliamentary* elections, vide sup. vol. II. p. 382. As to bribery in *municipal* elections, see 5 & 6 Will. 4, c. 76, s. 54. As to bribery of *custom house officers*, see 16 & 17 Vict. c. 107, s. 262; of *excise officers*, 7 & 8 Geo. 4, c. 53, s. 12. As to bribery of officers *of the Court of Chancery*, see 3 & 4 Will. 4, c. 94, s. 41. As to bribery of *public officers in the East Indies*, see 33 Geo. 3, c. 52, s. 62.

(*z*) Hawk. P. C. b. 1, c. 66; and see R. *v.* Pinney, 3 B. & Ad. 946; R. *v.* Neale, 9 Car. & P. 431.

(*a*) Hawk. P. C. b. 1, c. 68; and see R. *v.* Holland, 5 T. R. 607.

[of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due. The punishment] for this misdemeanor [is fine and imprisonment, and sometimes a forfeiture of the office (*b*).]

(*b*) See 3 Edw. 1, c. 26; 3 Inst. 145; R. *v.* Gilham, 6 T. R. 265; R. *v.* Jones, 2 Camp. 131. As to extortion by British subjects in the East Indies, in receiving gifts, see 33 Geo. 3, c. 52, s. 62; Re Capt. Douglas, 3 Q. B. 825; Queen *v.* Douglas, 16 L. J. (M. C.) 117; Douglas *v.* Queen, 13 Q. B. 74. By 1 & 2 Will. 4, c. 56, any judge or other officer in *Bankruptcy*, taking other than his lawful fees shall forfeit 500*l.*, and be incapable of holding office; and see on the subject of extortion in general, Bac. Abr. tit. Fees; Jac. L. Dict. Extortion, &c.

CHAPTER X.

OF OFFENCES AGAINST THE PUBLIC PEACE.



We are next to consider offences against the public peace (*a*); in our consideration of which, however, it is to be understood, that those are passed over which more immediately and properly range themselves under other chapters of the work,—such as offences against the person and the like. Those at present in question, are of two sorts; amounting either to actual breaches of the peace, or only to acts provocative of a breach of the peace by others. Actual breaches of the peace are also either felonious, or not felonious. [The felonious breaches of the peace are strained up to that degree of malignity by virtue of several modern statutes; and particularly,

I. *The riotous assembling of twelve persons or more, and not dispersing upon proclamation.* This was first made treason by statute 3 & 4 Edw. VI. c. 5; when the king was a minor, and a change of religion to be effected: but that statute was repealed by the first Act of Queen Mary, among the other treasons created since the twenty-fifth year of Edward the third; though the prohibition was in substance re-enacted, with an inferior degree of punishment, by statute 1 Mar. st. 2, c. 12; which made the same offence a single felony. These statutes specified, and particularized, the nature of the riots they were meant to suppress; as, for example, such as were set on foot with

(*a*) As to the law in general, relating to the public peace and its conservators, vide sup. vol. II. bk. IV. pt. I. c. X.

[intention to offer violence to the Privy Council; or to change the laws of the kingdom; or for certain other specific purposes: in which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of Mary made felony, but within the benefit of clergy; and also the Act indemnified the peace officers and their assistants, if they killed any of the mob in endeavouring to suppress such riot. This was thought a necessary security in that sanguinary reign; when popery was intended to be established, which was like to produce great discontents: but at first it was made only for a year, and was afterwards continued for that queen's life. And by statute 1 Eliz. c. 16, when a reformation in religion was to be once more attempted, it was revived and continued during her life also; and then expired. From the accession of James the first to the death of Queen Anne, it was never once thought expedient to revive it; but in the first year of George the first, it was judged necessary, in order to support the execution of the Act of Settlement, to renew it; and at one stroke to make it perpetual, with large additions. For whereas the former Acts expressly defined and specified what should be accounted a riot, the statute 1 Geo. I. st. 2, c. 5] (commonly called the Riot Act), [enacts generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace; and any one justice of the peace, sheriff, under-sheriff or mayor of a town, shall think proper to command them by proclamation to disperse,—if they contemn his orders, and continue together for one hour afterwards, such contempt shall be felony:] and the punishment is penal servitude for life, or not less than fifteen years; or imprisonment, with or without hard labour or solitary confinement, for not more than three years (*b*). And further, the Riot Act declares [that if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and

(*b*) 1 Geo. 1, st. 2, c. 5; 7 Will. 4 & 1 Vict. c. 91; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

[hinderers, and all persons to whom such proclamation *ought to have been made*, and knowing of such hindrance, and not dispersing, are felons :] and they are liable to the like punishment (*c*). The Riot Act also [contains a clause indemnifying the officers and their assistants in case any of the mob be unfortunately killed in the endeavour to disperse them ;]—such clause [being copied from the Act of Queen Mary (*d*).]

II. *Riotously demolishing buildings or machinery.* By 7 & 8 Geo. IV. c. 30, s. 8, if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy; or begin to demolish, pull down, or destroy; any church, chapel, house, or other such buildings or machinery as in the Act mentioned,—every such offender shall be guilty of felony: and he is liable to penal servitude for life, or any term not less than three years; or to be imprisoned, with or without hard labour, for any term not more than three years (*e*).

By 7 & 8 Geo. IV. c. 31, ss. 2, 3 (*f*), if any church, chapel, house, or such buildings or machinery, as in the Act mentioned, shall be feloniously demolished, (wholly or in

(*c*) 1 Geo. 1, st. 2, c. 5; 7 Will. 4 & 1 Vict. c. 91; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*d*) Provisions were also contained in 1 Geo. 1, c. 5, against the riotous destruction of churches and other places of religious worship, making such offences capital felonies; but these enactments were repealed by 7 & 8 Geo. 4, c. 27.

(*e*) 7 & 8 Geo. 4, c. 30, s. 8; 4 & 5 Vict. c. 56, s. 2; 6 & 7 Vict. c. 10; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to this offence, vide R. *v.* Adams, 1 Car. & M. 299; R. *v.* Langford, ibid. 602; R. *v.* Harris, ibid. 661; R. *v.* Simpson, ibid. 669; R. *v.* Whiston, 2 Dowl. N. S. 408; Birley *v.* Inhabitants of Salford, 11 Mee. & W. 391.

(*f*) At one time, the *hundred* were liable for any damage riotously committed, though it did not amount to demolition, or to an attempt to demolish. But this was altered by the statute mentioned in the text, and the repealing Act of the same session, (c. 27). By 2 & 3 Will. 4, c 72, the provisions of 7 & 8 Geo. 4, c. 31, on this subject are extended to the damage or destruction of threshing machines: and by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104,) s. 477, to the plunder, damage or destruction of ships or boats stranded or in distress.

part,) by persons riotously and tumultuously assembled together, the inhabitants of the hundred shall be liable to yield full compensation; provided that the persons damnified, or such of them as have knowledge of the circumstances, or the servants who had the care of the property, shall, within seven days, go before some justice of the peace, residing near and having jurisdiction; and state upon oath the names of the offenders, if known; and submit to examination touching the circumstances; and become bound, by recognizance, to prosecute: and provided also, that any action against the hundred be commenced within three calendar months after the offence (*g*).

III. By 4 Geo. IV. c. 54, s. 3 (*h*), knowingly to *send any letter or writing*, with or without a name or signature subscribed thereto, or with a fictitious name or signature, *threatening to kill or murder* any of the king's subjects, or to burn or destroy their houses, outhouses, barns, stacks of corn or grain, hay or straw,—is made felony: and the punishment is penal servitude for life, or for any term not less than three years; or imprisonment, with or without hard labour for any term not more than seven years (*i*). And also by 10 & 11 Vict. c. 66, knowingly to send any letter or writing threatening to kill or murder any other person; or to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay or straw or other agricultural produce: or to procure, counsel, aid or abet such offences;—is felony: and the punishment is penal servitude for life or not less than three years, or imprisonment for four years (*k*).

(*g*) When the damage does not exceed 30*l*. the statute (7 & 8 Geo. 4, c. 31, s. 8,) gives, instead of an action, a summary proceeding before justices at a special petty session.

(*h*) The former provisions on the subject, contained in 9 Geo. 1, c. 22, and 27 Geo. 2, c. 15, are repealed by 4 Geo. 4, c. 54, s. 3.

(*i*) 4 Geo. 4, c. 34, s. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to threatening letters, *with a view to extort property*, vide sup. p. 198.

(*k*) 10 & 11 Vict. c. 66; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

This offence was formerly high treason, by the statute 8 Hen. VI. c. 6; which provision, however, was repealed by the effect of 1 Edw. VI. c. 12.

The above mentioned, are the breaches of the public peace amounting to felony. The remainder are of a lighter character.

IV. [*Affrays*, (from *affraier*, to terrify,) are the fighting of two or more persons in some public place (*l*), to the terror of her majesty's subjects; for if the fighting be in private it is no *affray*, but an *assault* (*m*).] Affrays are misdemeanors; and [may be suppressed by any private person present: who is justifiable in endeavouring to part the combatants, whatever consequences may ensue (*n*). But more especially the constable or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers: and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace (*o*). The punishment of *common* affrays, is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel (*p*); this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray,] and may even amount to felony under 7 Will. IV. & 1 Vict.

(*l*) As in the case of a prize fight or other pugilistic combat. 1 East, P. C. c. 5, s. 41; R. *v.* Bellingham, 2 C. & P. 234; Hawk. P. C. b. 1, c. 63, s. 2.

(*m*) Hawk. P. C. ubi sup.

(*n*) Hawk. P. C. b. 1, c. 63, s. 13.

(*o*) Ibid. It seems that a constable has no power to arrest without warrant, for an affray committed out of his own presence. Cook *v.* Nethercote, 6 C. & P. 741; Fox *v.* Gaunt, 3 B. & Ad. 798; R. *v.* Curvan, R. & M. C. C. R. 132; R. *v.* Bright, 4 C. & P. 387.

(*p*) Hawk. P. C. b. 1, c. 63, s. 21.

c. 85, s. 3 (*q*), though no mischief has actually ensued. [Another aggravation is, when thereby the officers of justice are disturbed in the due execution of their office; or where a respect to the particular place, ought to restrain and regulate men's behaviour more than in common ones; as in the court of the sovereign, and the like (*r*). And upon the same account also, all affrays in a church or churchyard are esteemed very heinous offences; as being indignities to Him to whose service those places are consecrated. Therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by statute 5 & 6 Edw. VI. c. 4, that if any person shall—by words only—quarrel, chide, or brawl in a church or churchyard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiæ;* and if a clerk in orders, from the ministration of his office during pleasure (*s*). And if any person in such church or churchyard proceeds to smite (*t*) or lay violent hands upon another, he shall be excommunicated *ipso facto* (*u*). Two persons may be guilty of an affray;] but

V. [*Riots* (*v*), *routs, and unlawful assemblies,*] (all of which are misdemeanors (*x*),) [must have three persons at least to constitute them.] 1. A *riot,* seems to be a tumultuous disturbance of the peace by three persons, or more; assembling together of their own authority, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprise of a private

(*q*) Vide sup. p. 149.

(*r*) Hawk. P. C. b. 1, c. 21, ss. 6, 10; c. 63, s. 23. As to striking and other outrage in the king's courts, &c., vide sup. p. 290.

(*s*) As to this statute, see Cox *v.* Goodday, 2 Hagg. R 139.

(*t*) Further provisions were made, by this statute, for the case of weapons being used or drawn in churches, &c.; but these were repealed by 9 Geo. 4, c. 31, s. 1.

(*u*) As to excommunication, vide sup. p. 15. As to disturbing congregation during divine service, vide sup. vol. III. p. 42.

(*v*) The *riots* here referred to are those at common law, and not assemblies under the Riot Act, as to which vide sup. p. 315.

(*x*) Hawk. P. C. b. 1, c. 65; 1 Russ. 288.

nature; and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, —whether the act intended were of itself lawful or unlawful (y). 2. A *rout*, seems to be a disturbance of the peace by persons assembling together with an intention to do a thing which, if it be executed, will make them rioters, and actually making a motion towards the execution thereof (z). 3. An *unlawful assembly*, seems to consist of any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the subjects of the realm (a). The punishment of riots, which, (the persons assembled not amounting to twelve,) fall not under the Riot Act before referred to (b), is fine and imprisonment; to which hard labour may, (by 3 Geo. IV. c. 114,) be superadded. The same punishment, but without this addition, attaches to the offences of routs and unlawful assemblies. [By the stat. 13 Hen. IV. c. 7, moreover, any two justices, together with the sheriff or undersheriff of the county, may come with the *posse comitatus*, if need be; and suppress any such riot, assembly, or rout; arrest the rioters; and record, upon the spot, the nature and circumstances of the whole transaction: which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it hath been holden, that all persons, noblemen and others, (except women, clergymen, persons decrepit, and infants under fifteen,) are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment (c); and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable (d). So that our antient law, previous to the modern

(y) Hawk. P. C. b. 1, c. 66, s. 1; and see Cox v. Goodday, ubi sup.; 2 Hagg. R. 139.

(z) Hawk. P. C. b. 1, c. 65, s. 8.

(a) Hawk. P. C. b. 1, c. 65, s. 9; et vide 57 Geo. 3, c. 19, s. 23; post, p. 321.

(b) Vide sup. p. 315.

(c) See R. v. Pinney, 3 B. & Ad. 946; R. v. Neale, 9 C. & P. 431; R. v. Brown, 1 Car. & M. 314.

(d) 1 Hale, P. C. 495; Hawk. P. C. b. 1, c. 65, s. 20.

[Riot Act, seems pretty well to have guarded against any violent breach of the public peace; especially as any riotous assembly on a public or general account,—as to redress grievances, or to pull down all inclosures,—and also resisting the Royal forces if sent to keep the peace, may amount to overt acts of treason by levying war against the sovereign (*e*).]

VI. Nearly related to this head of riots is the misdemeanor [of *tumultuous petitioning;* which was carried to an enormous height, in the times preceding the grand rebellion. Wherefore by statute 13 Car. II. st. 1, c. 5, it is enacted, that not more than twenty names shall be signed to any petition to the Crown or either house of parliament for any alteration of matters established by law in Church or State: unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assizes or quarter sessions; and, in London, by the lord mayor, aldermen, and common council (*f*): and that no petition shall be delivered by a company of more than ten persons: on pain, in either case, of incurring a penalty not exceeding 100*l.* and three months' imprisonment (*g*).]

And further, it is provided by 57 Geo. III. c. 19, s. 23, that it shall not be lawful for any person to convene, or give notice of convening, any meeting consisting of more than fifty persons; or for any number of persons exceeding the number of fifty to meet in any street, square, or open space in the city or liberties of Westminster or county of Middlesex, within the distance of a mile from the gate of Westminster Hall, (except such parts of the parish of St. Paul's, Covent Garden, as are within such distance,) for

(*e*) Vide sup. p. 227.

(*f*) This may be one reason, says Blackstone (vol. iv. p. 147), among others, why the corporation of London has, since the Restoration, usually taken the lead in petitions to parliament for the alterations of any established law.

(*g*) As to this statute, see R. *v.* Gordon, Dougl. Rep. 592.

the purpose of considering of or preparing any petition, complaint, remonstrance, declaration or other address, to both or either house of parliament, for alteration of matters in Church or State, on any day on which the two houses or either house of parliament shall meet and sit, or shall be summoned or adjourned or prorogued to meet or sit, nor on any day on which the courts shall sit in Westminster Hall; and any such meeting is by the Act made an *unlawful assembly* (*h*). But there is a provision that the enactment shall not apply to any meeting for the election of members to serve in parliament, or to persons attending upon the business of either house of parliament, or any of the said courts (*i*).

VII. [A seventh offence against the public peace is that of a *forcible entry* or *detainer;* which is committed by violently taking,—or,] after an unlawful taking, violently [keeping possession of—lands and tenements, with menaces, force and arms, and without the authority of law (*k*).] A forcible entry [was formerly allowable to every person disseised or turned out of possession, unless his entry was taken away or barred by his own neglect or other circumstances;] but it is now,—as well as a forcible detainer,—a misdemeanor, punishable by imprisonment and ransom, at the pleasure of the Crown (*l*). And on this offence it will be unnecessary on the present occasion to say more, the subject having already sufficiently attracted our attention in a former volume (*m*).

(*h*) As to what this term imports, vide sup. p. 320.

(*i*) The other enactments contained in this Act, and in 60 Geo. 3 & 1 Geo. 4, c. 6, as to assemblies of persons collected under pretext of public grievances, &c., appear to have been only temporary, and to be now expired. (1 Russ. on Crimes, p. 280.)

(*k*) See R. *v.* Oakley, 4 Barn. & Adol. 30; R. *v.* Wilson, 3 Ad. & El. 817; 1 Russ. on Crimes, p. 310.

(*l*) See the statutes 5 Ric. 2, st. 1, c. 8; 15 Ric. 2, c. 2; 8 Hen. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15.

(*m*) Vide sup. vol. III. p. 337.

VIII. [The offence of *riding or going armed with dangerous or unusual weapons*] is a misdemeanor, tending to disturb the public peace, [by terrifying the good people of the land; and is particularly prohibited by the Statute of Northampton, (2 Edw. III. c. 3,) upon pain of forfeiture of the arms, and imprisonment during the pleasure of the Crown; in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour (*n*).]

IX. [*Spreading false news*, to make discord between the sovereign and nobility, or concerning any great man of the realm, is] also a misdemeanor, punishable by common law (*o*) with fine and imprisonment; which is confirmed by statutes Westminster the first, (3 Edw. I. c. 34); 2 Ric. II. st. 1, c. 5; and 12 Ric. II. c. 11.

X. [*False and pretended prophecies*, with intent to disturb the peace, are equally unlawful and more penal, as they raise enthusiastic jealousies in the people, and terrify them with imaginary fears. They are, therefore, punished by our law] as misdemeanors; and that, [upon the same principle that spreading of public news of any kind, without communicating it first to the magistrate, was prohibited by the antient Gauls (*p*). Such false and pretended prophecies were punished capitally] by 33 Hen. VIII. c. 14; which was however altered by the temporary Acts of 3 & 4 Edw. VI. c. 15, and 7 Edw. VI. c. 11 (*q*): [and now by the statute 5 Eliz. c. 15, the penalty for the first offence is a fine of ten pounds and one year's imprisonment; for the

(*n*) Pott. Antiq. b. 1, c. 26.

(*o*) 2 Inst. 226; 3 Inst. 198.

(*p*) "*Habent legibus sanctum, si quis quid de republicâ a finitimis rumore aut famâ acceperit, uti ad magistratum deferat, neve cum alio communicet; quod sæpe homines temerarios atque imperitos falsis rumoribus terreri, et ad facinus impelli, et de summis rebus consilium capere, cognitum est.*"—Cæs. de Bell. Gall. lib. 6, cap. 19.

(*q*) Vide Coleridge's Blackstone (vol. iv. p. 149), *in notis*, where Blackstone's statement on this subject is corrected.

[second, forfeiture of all goods and chattels and imprisonment during life.]

XI. [Besides actual breaches of the peace, any thing that tends to provoke or incite others to break it, is an offence of the same denomination. Therefore, *challenges to fight*, either by word or letter, or to be the bearer of such challenges, are] misdemeanors, [punishable by fine and imprisonment, according to the circumstances of the offence (*r*).]

XII. Another kind of misdemeanor, amounting in many instances to an incitement to break the peace, is the *publication of a libel.* Of *defamatory* libels we have already said so much in a former volume (*s*), as to preclude the necessity for any copious discussion of them on the present occasion. It may be right, however, to remark in this place, that by the recent provisions of 6 & 7 Vict. c. 96 (*t*), it is enacted (sect. 3), that if any person shall publish or threaten to publish any libel, or directly or indirectly propose to abstain from printing or publishing, or offer to prevent the printing or publishing of any matter touching any person, with intent to extort any money, security for money, or valuable thing from such person or any other; or with intent to induce any person to confer or procure any appointment or office of profit or trust;—he shall be liable to imprisonment, with or without hard labour, for a term not exceeding three years. Also (sect. 4), that if any person shall maliciously publish any defamatory libel, knowing the same to be false, he shall be imprisoned for a term not exceeding two years, and pay such fine as

(*r*) Hawk. P. C. b. 1, c. 63, ss. 3, 21. Challenges arising on account of monies won at gaming were formerly, by 9 Ann. c. 14, punishable with forfeiture and imprisonment. But that statute is now repealed by 9 Geo. 4, c. 31, s. 1; 5 & 6 Will. 4, c. 41, and 8 & 9 Vict. c. 109, s. 15.

(*s*) Vide sup. vol. II. p. 38; vol. III. p. 467.

(*t*) Amended by 8 & 9 Vict. c. 75.

the court shall award. And (sect. 5) that if any person shall maliciously publish any defamatory libel, (whether knowing the same to be false or not,) he shall be liable to fine or imprisonment, or both, as the court shall award, such imprisonment not to exceed one year.

It is also necessary to observe, that besides defamatory libels, the term of libel legally includes such writings as are of a blasphemous, treasonable, seditious or immoral kind; the publication of any of which is equally a misdemeanor (*u*), and subjects the person by whom it was composed, written, printed or published, to fine and imprisonment. And by 60 Geo. III. & 1 Geo. IV. c. 9, s. 16, it is enacted, that if a person charged with printing or publishing any blasphemous, seditious, or malicious libel, be brought up to give bail,—the court, judge, or justice of the peace, before whom he is so brought, may make it part of the condition of the recognizance that he shall be of good behaviour during the continuance of the recognizance. And by cap. 8, of the same session, it is also provided, as to libels of a blasphemous or seditious kind, that in every case in which any verdict or judgment by default shall be had against any person for composing, printing, or publishing the same,—the judge or court before whom such verdict shall have been given, may order the seizure and detaining of all copies of such libel which shall be in the possession of the person against whom such verdict was given; or in the possession of any other person, named in the order, for his use: and upon proper evidence being offered of such possession, it shall be lawful for any justice of the peace, constable, or other peace officer, acting under such order, to search for such copies in any house or other building or place belonging to the person named in such order; and to enter by day, by force, if admission be refused or unreasonably delayed (*x*).

(*u*) See 4 Bl. Com. p. 451, note by Christian.

(*x*) A second offence in publishing a seditious or blasphemous libel,

The offence of libel was treated at certain periods, under the Roman law, with more severity. [By the law of the Twelve Tables, libels, which affected the reputation of another, were made a capital offence; but before the reign of Augustus, the punishment became corporal only (*z*). Under the Emperor Valentinian (*a*) it was again made capital not only to write but to publish, or even to omit to destroy them. But our law, in this and many other respects, corresponds rather with the middle age of Roman jurisprudence, when liberty, learning and humanity were in their full vigour;] and exhibits a moderation sufficient to protect it from any imputation of infringing the *liberty of the press.* This liberty, when rightly understood, [consists in laying no *previous* restraints upon publications; and not in freedom from censure for criminal matter, when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution (*b*), is to subject all

was by this statute punishable with banishment; but this was repealed by 11 Geo. 4 & 1 Will. 4, c. 73.

(*z*) ———— "*Quinetiam lex Pœnaque lata, malo quæ nollet carmine quenquam Describi:—vertere modum formidine* fustis."—Hor. ad Aug. 152.

(*a*) Cod. 9, 36.

(*b*) The art of printing, soon after its introduction, was looked upon, as well in England as in other countries, as merely a matter of state, and subject to the coercion of the Crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and, finally, by the decrees of the Court of Star Chamber, which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles the first, after their rupture with that prince, assumed the same powers as the Star Chamber exercised with respect to licensing of books; and in 1643, 1647, 1649 and 1652 (Scobell, i. 44, 134; ii. 88, 230), issued their ordinances for that purpose, founded principally on the Star Chamber decree of 1637. In 1662 was passed the statute 13 & 14 Car.

[freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish, as the law does at present, any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.]

2, c. 33, which, with some few alterations, was copied from the parliamentary ordinances. This Act expired in 1679, but was revived by statute 1 Jac. 2, c. 17, and continued till 1692. It was then continued for two years longer by statute 4 W. & M. c. 24; but though frequent attempts were made by government to revive it in the subsequent part of that reign (Com. Journ. 11 February, 1694, 26 November, 1695, 22 October, 1696, 9 February, 1697, 31 January, 1698), yet the parliament resisted it so strongly that it finally expired, and the press became properly free in 1694, and has ever since so continued. See also on this subject, sup. vol. III. p. 284.

CHAPTER XI.

OF OFFENCES AGAINST PUBLIC TRADE.



[OFFENCES against public *trade*, like those of the preceding classes, are either felonious or not felonious.] We shall notice—

I. That of smuggling, or the offence of importing or exporting goods prohibited, or without paying the duties imposed on goods not prohibited (*a*). This is restrained by the statutes relating to the customs; and in particular by the 16 & 17 Vict. c. 107 (called the "Customs Consolidation Act, 1853), it is, among other things, provided (sect. 209), that if any goods liable to the payment of duties shall be unshipped from any ship or boat in the united kingdom (customs or other duties not being first paid or secured); or if any prohibited goods be imported or brought into any part of the united kingdom; or if any goods whatever which have been warehoused or otherwise secured in the united kingdom shall be clandestinely or illegally removed; or if any goods prohibited to be exported shall be put on board with intent to be laden or shipped for exportation, or with that object shall be brought to any wharf or other place in the united kingdom, or shall

(*a*) According to Blackstone, "smuggling" is the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise. But this is too narrow a definition.

be found in any package produced to an officer of customs as containing goods not so prohibited; or if any goods subject to any duty or restriction in respect of importation, or which are prohibited to be imported, shall be found concealed on board any ship within the limits of any port of the united kingdom, or shall be found either before or after landing to have been so concealed within such limits, —all such goods so imported, exported or found, shall be forfeited to the Crown, together with any goods which shall be found packed with or used in concealing them. By sect. 248, it is further enacted, that if any persons to the number of three or more, armed with firearms or other offensive weapons, shall, within the united kingdom or any of the ports, harbours or creeks thereof, be assembled in order to be aiding, or shall aid, in the illegal landing, running or carrying away of prohibited goods, or goods liable to any duties which have not been paid or received; or in rescuing or taking away any such goods after seizure; or in rescuing any person apprehended for any offence made felony by any Act relating to the customs; or in preventing the apprehension of any person guilty of such offence,—every person so offending, and every person aiding therein, shall be guilty of felony: and he is liable to penal servitude for life, or not less than fifteen years, or to be imprisoned for not exceeding three years (*b*). By sect. 249, persons maliciously shooting at any vessel or boat belonging to the navy or in the service of the revenue, within one hundred leagues of the coast of the united kingdom; or maliciously shooting at, maiming, or dangerously wounding any full pay officer of the army, navy or marines, or any officer of customs or excise, or those aiding them, while duly employed for the prevention

(*b*) 16 & 17 Vict. c. 107, s. 248; 20 & 21 Vict. c. 3.

of smuggling and in the execution of his or their duty;—shall also be liable to the punishment last particularized. By sect. 250, if any person, (being in company with more than four other persons,) be found with any goods, liable to forfeiture under any Act relative to the customs or excise; or (in company with one other person within five miles of the coast, or of any tidal river) be found carrying offensive arms or weapons, or disguised in any way,—he shall be adjudged guilty of felony; and he may be sentenced to penal servitude for not more than seven or less than three years (*c*). And persons assaulting or obstructing any such officers as above mentioned (or their assistants) in the performance of their duty, by force or violence,—are punishable with penal servitude for not more than seven or less than three years; or with imprisonment, with hard labour, for not more than three years (*d*).

It is also enacted by 9 Geo. IV. c. 31, s. 25, that if any person be convicted, *as of a misdemeanor*, of any assault upon a revenue officer in the due execution of his duty, or upon any person acting in aid of such officer, he may be imprisoned, with or without hard labour, for any term not exceeding two years, and may also be fined and bound over to keep the peace.

II. Among the offences against public trade must also be numbered certain *frauds committed by bankrupts and insolvents*, contrary to the provisions of the several Acts of parliament made in relation to these descriptions of persons. The greater part of these, however, (some of which

(*c*) 16 & 17 Vict. c. 107, s. 250; 20 & 21 Vict. c. 3.

(*d*) 16 & 17 Vict. c. 107, s. 251; 20 & 21 Vict. c. 3. By 19 & 20 Vict. c. 75, s. 3, there is a penalty of 10*l*. attached to the offence of wilfully destroying or injuring any buoy or mark used in the Preventive Service, or for the purposes of the Customs.

amount to felonies,) we have already noticed in a former part of the work, when engaged on the subjects of bankruptcy and insolvency (*e*); and it will be unnecessary to recapitulate them in this place.

III. [*Cheating* is another offence, more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither, therefore, may be referred that prodigious multitude of statutes, which are made to restrain and punish deceits in particular trades (*f*), and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves.] The offence of *adulterating bread, corn, meal or flour* (*g*), under 3 Geo. IV. c. cvi., and 6 & 7 Will. IV. c. 37, [is reducible to this head of cheating; as is likewise, in a peculiar manner, the offence of *selling by false weights and measures*, the standard of which fell under our consideration in a former volume (*h*). The punishment of bakers,] for offences relating to bread, [was antiently to stand in the pillory, by statute 51 Hen. III. st. 6; and for brewers, by the same Act, to stand in

(*e*) Vide sup. vol. II. bk. II. pt. II. c. VI. By the "Lords Act," 32 Geo. 2, c. 28, amended by 33 Geo. 3, c. 5, (made perpetual by 39 Geo. 3, c. 50,) it is also felony, if a prisoner charged in execution for any debt under 300*l.* neglects or refuses on demand to deliver up his effects for the benefit of his creditors. But this provision seems to be now superseded by the effect of the more modern statutes relating to insolvency,—as to which, vide sup. vol. II. p. 177.

(*f*) By 19 & 20 Vict. c. 114, provisions are made "to prevent false packing and other frauds in the *hay and straw trade*," which trade is regulated by 36 Geo. 3, c. 88.

(*g*) Blackstone mentions (vol. iv. p. 157) the offence of *breaking the assize of bread*,—that is, violating the rules laid down by several statutes for regulation of its price, viz., 51 Hen. 3, st. 1 and 6; ord. pistor. 2 & 3 Edw. 6, c. 15; 31 Geo. 2, c. 29. But all statutes relating to the assize are repealed by 6 & 7 Will. 4, c. 37, and (as to the city of London) by 3 Geo. 4, c. cvi.,—which contain new regulations as to the bread trade.

(*h*) Vide sup. vol. II. p. 527.

[the tumbrel or dung-cart (*i*); which, as we learn from Domesday Book, was the punishment for knavish brewers in the city of Chester, so early as the reign of Edward the Confessor. "*Malam cerevisiam faciens, in cathedrâ ponebatur stercoris*" (*k*). But now the general punishment for all frauds of this kind, if indicted, as they may be, at common law (*l*), is by fine and imprisonment;] to which, by 14 & 15 Vict. c. 100, s. 29, hard labour may now be added; [though the easier and more usual way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several Acts of parliament. Lastly, any deceitful practice, in cozening another, whether in matters of trade or otherwise,] by such artful practice, (short of felony,) as common prudence could not have guarded against (*m*),—as by playing with false dice or the like,—is punishable with fine and imprisonment (*n*). And by statutes, which we have had occasion to notice in former parts of this volume (*o*), the particular offences of false personation, and obtaining money by false pretences, are visited with severer penalties. To which instances, we may here add two others. By 32 Geo. III. c. 56, if any person shall personate a master and give a false character to a servant, or assert in writing that a servant has been hired for a period of time or in a station, or was discharged at any time, or had not been hired in any previous service, contrary to truth; or if any person shall offer himself as a servant, pretending to have served where he has not served, or with a false certificate of character, or shall alter a certificate, or shall pretend not to have been in any previous

(*i*) 3 Inst. 219.

(*k*) Seld. Tit. of Hon. b. 2, c. 5, s. 3.

(*l*) R. *v.* Treve, 2 East, P. C. 821; R. *v.* Dixon, 3 Mau. & Sel. 11; R. *v.* Haynes, 4 Mau. & Sel. 214.

(*m*) 2 Russ. on Crimes, p. 286.

(*n*) Ibid.

(*o*) Vide sup. pp. 216, 217.

service, contrary to truth; the offenders, in any of the above cases are liable, on conviction before two justices of peace, to be fined twenty pounds; and in default thereof to be imprisoned with hard labour for any time not more than three nor less than one calendar month. Also by 6 Vict. c. 18, s. 83, the false personation of voters at an election of a member of parliament is made a misdemeanor; punishable with imprisonment and hard labour for any term not exceeding two years.

IV. A *monopoly* is [a licence or privilege allowed by the sovereign for the sole buying and selling, making, working, or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before (*p*). These monopolies had been carried to an enormous height during the reign of Queen Elizabeth, and were heavily complained of by Sir E. Coke (*q*), in the beginning of the reign of James the first; but were in great measure remedied by statute 21 Jac. I. c. 3, which declares such monopolies to be contrary to law and void; (except as to patents to the authors of

(*p*) Vide sup. vol. II. pp. 25, 34. The old offences of *forestalling the market*, *regrating* and *engrossing*, are now repealed, (with many other statutes in restraint of trade,) by 7 & 8 Vict. c. 24. The offence of *forestalling* the market, consisted in buying the merchandize on its way to market, or dissuading persons to bring their goods there, or persuading them to enhance the price when there. That of *regrating*, consisted in buying corn, &c., in any market, and selling it again in or near the same place. That of *engrossing*, was getting into one's possession, or buying up large quantities of corn, &c., with intent to sell them again. We may also here allude to two other offences mentioned by Blackstone, (vol. IV. pp. 154, 156,) viz., that of *owling*, or the offence of transporting wool or sheep out of the kingdom; which, (with all other offences relating to the exportation of wool or sheep,) was repealed by 5 Geo. 4, c. 47: and that of *usury*; as to the history of which, vide sup. vol. II. p. 87.

(*q*) 3 Inst. 181.

[new inventions (*r*), and except also patents concerning printing, saltpetre, gunpowder, great ordnance and shot;) and monopolists are punished with the forfeiture of treble damages to those whom they attempt to disturb; and if they procure any action, brought against them for these damages, to be stayed by any extra-judicial order, other than that of the court wherein it is brought, they incur the penalties of a *præmunire* (*s*).]

(*r*) As to patents for new inventions, vide sup. vol. II. p. 25.

(*s*) As to a *præmunire*, vide sup. p. 238. It was formerly an offence *to transport and seduce our artists to settle abroad or even to export any tools or utensils* used in certain manufactures. And these are both classed by Blackstone as offences against public trade. But, as restrictions upon trade, such offences are now removed. By 5 Geo. 4, c. 97, the pre-existing regulations of 5 Geo. 1, c. 27; 23 Geo. 2, c. 13; 25 Geo. 3, c. 67—and by 6 Geo. 4, c. 105, those of 14 Geo. 3. c. 71—were repealed. And see also 6 & 7 Vict. c. 84, s. 24, repealing such part of 3 & 4 Will. 4, c. 52, as prohibited the exportation of certain tools and utensils from the United Kingdom.

CHAPTER XII.

OF OFFENCES AGAINST THE PUBLIC HEALTH, POLICE, OR ECONOMY.



The nature of the offences indicated by the title of this chapter, so far as they regard the public health, will be readily conceived: but it may be necessary to remark, that by offences against the public police and economy, we mean those committed against the due regulations and domestic order of the kingdom; [whereby the individuals of the State, like the members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous; as it comprises all such crimes as especially affect public society, and are not comprehended under any of the preceding species (*a*). These amount, some of them to felonies, and others to misdemeanors only.] We shall notice in the first place (*b*)—

I. *Offences against the Quarantine and Vaccination Acts.* These statutes, as we have seen in a former volume (*c*), inflict in general the penalties of fine and imprisonment on every person by whom their provisions shall be violated;

(*a*) Vide sup. p. 218.

(*b*) The offences falling under this division of offences against the public police and economy are so numerous that some selection will be indispensable. Those, therefore, will in general be omitted which are comprised in statutes sufficiently dwelt upon in other parts of the work; such as the marriage and registration Acts, the different revenue Acts, &c.

(*c*) Vide sup. vol. III. p. 266.

and such offences amount to misdemeanors only; but by a particular provision of 6 Geo. IV. c. 78, s. 21, it is felony in an officer of the customs to desert from his duty respecting quarantine, or to permit unauthorized departure from the lazarets: and such felony is punishable with penal servitude for not more than seven or less than three years, or imprisonment for not more than two years, with or without hard labour and solitary confinement (*d*).

II. [Another offence under the present head, is the *selling of unwholesome provisions.* To prevent which, the statute 51 Hen. III. st. 6, prohibits the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement, fine and imprisonment, and abjuration of the town, according to the frequency of the offence (*e*). By the statute 12 Car. II. c. 25, s. 11, any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant, and 40*l.* if done by the vintner or retail trader;] and additional regulations are made upon this subject by 1 W. & M. st. 1, c. 39, s. 20. By 3 Geo. IV. c. cvi. and 6 & 7 Will. IV. c. 37, provisions are also made against the adulteration of bread, corn, meal or flour (*f*); and by 11 & 12 Vict. c. 107, against the exposure to sale of infected sheep or lambs.

III. [*Common nuisances,* are a species of offence against the public order and economical regimen of the State; being either the doing a thing to the annoyance of all the king's subjects, or the neglecting to do a good which the common good requires (*g*).] They are of the class of misdemeanors; and are distinguishable from *private* nuisances

(*d*) 6 Geo. 4, c. 75, s. 21; 7 & 8 Geo. 4, c. 28, ss. 8, 9; 11 Geo. 4 & 1 Vict. c. 90, s. 5; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. See Russell on Crimes, vol. i. p. 106, n. (*b*).

(*e*) See as to this Burnby *v.* Bollett, 16 Mee. & W. 644.

(*f*) Vide sup. p. 330.

(*g*) Hawk. P. C. b. 1, c. 75, s. 1.

as being a grievance to the community at large, and not merely to particular persons (*h*). Of the nature of common nuisances are—1. Annoyances in *highways, bridges,* and *public rivers.* Offences in respect of *highways* and *bridges* may be committed (as we have had occasion elsewhere to notice (*i*)), either positively, by actual obstructions, or negatively, by want of reparations. The latter, or negative, kind of offences, can of course only be committed by those upon whom an obligation lies to keep them in repair: that is to say, in the case of highways (in general), the parishes in which they respectively lie; and in the case of bridges, the counties at large in which they are situate. But the positive offences against highways and bridges, consist of a variety of nuisances and other injuries (*k*) capable of being committed by any person indiscriminately; some of which are punishable at common law, and others by the express provisions of the highway, bridge and turnpike Acts (*l*). It is moreover provided by statute, that the commission of any injury or mischief to any *navigable river* or *canal,* with intent to obstruct the navigation, shall be punished with penal servitude for not more than seven or less than three years; or imprisonment for two years, with the addition of hard labour, solitary confinement and whipping, at the discretion of the court (*m*): and a similar penalty, (except that the imprisonment may be for four years,) is attached to the offence of pulling down or destroying, or doing any injury

(*h*) As to private nuisances, vide sup. vol. III. p. 490.

(*i*) Vide sup. vol. III. p. 232.

(*k*) When there is a house erected, or an inclosure made, upon any part of the royal demesnes, or of a highway or common street or public water, or such like public things,—the proper and antient name for such a nuisance is a *purpresture;* from the French word *pourpris,* an inclosure. (See 4 Bl. Com. p. 167, citing Co. Litt. 277.)

(*l*) As to nuisances to highways, see 5 & 6 Will. 4, c. 50; 4 & 5 Vict. cc. 51, 59; 8 & 9 Vict. c. 71; 11 & 12 Vict. c. 123. As to nuisances to turnpike roads, see 3 Geo. 4, c. 126; 4 Geo. 4, c. 95; 4 & 5 Vict. cc. 33, 51. As to nuisances to bridges, see 55 Geo. 3, c. 143.

(*m*) 7 & 8 Geo. 4, c. 30, s. 12; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

with intent and so as thereby to render dangerous or impassable, any *public bridge* (*n*). 2. The carrying on of *offensive* or *dangerous trades* or *manufactures* (*o*). These, which, [when injurious to a private man, are actionable, are, when detrimental to the public, punishable by fine and imprisonment] (*p*): and it may be remarked, that to support an indictment for these nuisances, it is not necessary to prove that they are offensive to health, if they are offensive to the senses (*q*). 3. *Exposing*, in a public thoroughfare, a *person infected* with a contagious disease, is a common nuisance, and punishable in a similar manner (*r*). 4. [All *disorderly inns, or other houses* (*s*); *bawdy houses* (*t*); *gaming houses; play houses unlicensed* or *improperly conducted* (*u*); *unlicensed booths and stages for rope dancers and mountebanks* (*x*); and the like,—are] either at common law, or by statute, [public nuisances: and may, upon indictment, be suppressed and fined;] and their keepers in some cases imprisoned with hard labour (*y*). Against *gaming houses*, in particular, the efforts of the legislature have been di-

(*n*) 7 & 8 Geo. 4, c. 30, s. 13; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*o*) See 1 & 2 Geo. 4, c. 41, as to the negligent use of furnaces or steam engines.

(*p*) Vide sup. vol. III. p. 490, as to *private* nuisances; the doctrines laid down as to which, apply generally to those that are *public*.

(*q*) Rex *v.* Neil, 2 C. & P. 485.

(*r*) See Rex *v.* Vantandillo, 4 M. & S. 73.

(*s*) As to alehouses, &c., vide sup. vol. III. bk. IV. pt. III. c. XII. We may remark here, that inns in particular,—being intended for the lodging and receipt of travellers,—may be indicted, suppressed, and the innkeepers fined, if they refuse to entertain a traveller without a very sufficient cause; for thus to frustrate the end of their institution is held to be disorderly behaviour. (Hawk. P. C. b. 1, c. 78, s. 2; Bull. N. P. 73; see Bennet *v.* Mellor, 5 T. R. 273; Rex *v.* Ivens, 7 C. & P. 213; Fell *v.* Knight, 8 Mee. & W. 269; et vide sup. vol. II. p. 83) Thus too the laws of Norway, says Blackstone (vol. iv. p. 168), punish in the severest degree such innkeepers as refuse to furnish accommodation at a just and reasonable price; and he cites Stiern. de Jure Sueon. l. 2, c. 9.

(*t*) See 25 Geo. 2, c. 36, s. 5.

(*u*) As to stage plays, vide sup. vol. III. p. 296.

(*x*) Bac. Ab. tit. Nuisances. But by 6 & 7 Vict c. 68, s. 23, theatrical representations in booths, or shows at fairs or feasts, &c.,—when allowed by the local authorities,—are lawful. Vide sup. vol. III. p. 296, n. (*a*).

(*y*) See 3 Geo. 4, c. 114.

rected with assiduous care (z). Thus the statute 33 Hen. VIII. c. 9, s. 11, prohibits the keeping any common house for dice, cards, or any unlawful games (a), under pecuniary penalties of 40*s.* for every day of so keeping the house, and 6*s.* 8*d.* for every time of playing therein. Also, by 9 Ann. c. 14, 2 Geo. II. c. 28, 13 Geo. II. c. 19, and 18 Geo. II. c. 34,—the games of faro; basset; ace of hearts; hazard; passage; roly poly and roulette; and all other games with dice, except backgammon;—are prohibited under a penalty of 200*l.* for him that shall erect the same, and 50*l.* a time for the players (b). And now by 8 & 9 Vict. c. 109 (c), and 17 & 18 Vict. c. 38, various provisions are made for the punishment of those who keep or frequent common gaming-houses; and for the suppression of such houses when discovered to exist. By these statutes it is provided, that the owner or keeper of any common gaming house (d), and every person having the care or ma-

(z) Blackstone describes gaming (vol. iv. p. 171) as a passion to which every valuable consideration is made a sacrifice; and which we seem to have inherited from our ancestors the antient Germans: whom Tacitus (De Mor. Germ. c. 24) describes to have been bewitched with the spirit of play to a most exorbitant degree; and to have scrupulously maintained what they considered as the point of honour, in making good their losses: "*ea est in re pravâ pervicacia, ipsi fidem vocant.*"

(a) By 8 & 9 Vict. c. 109, s. 1, so much of this Act as prohibits bowling, tennis, or other games of mere skill, is repealed.

(b) See also 30 Geo. 2, c. 24, s. 14, prohibiting, under a pecuniary penalty, gaming in public houses by labourers or servants. As to the offence of *gaming in a public place*, see also 5 Geo. 4, c. 83. In re Freestone, 1 H. & N. 93.

(c) This Act repeals a previous Act against fraudulent and excessive gaming, 16 Car. 2, c. 7; and also so much of two of the statutes mentioned in the text, viz. 9 Ann. c. 14, and 18 Geo. 2, c. 34, as relates to the offence of losing or winning to a certain amount. See also the temporary Acts, 7 & 8 Vict. cc. 3, 58. As to the different games that have been decided to fall within 16 Car. 2, c. 7, 9 Ann. c. 14, and 18 Geo. 2, c. 34, see Goodburn *v.* Morley, 2 Stra. 1159; Jeffreys *v.* Walter, 1 Wils. 220; Lynall *v.* Longbotham, 2 Wils. 36; Hodson *v.* Terhill, 2 Tyrw. 929; Bentinck *v.* Connop, 5 Q. B. 693; Daintree *v.* Hutchinson, 10 Mee. & W. 85; Applegarth *v.* Colley, ib. 723; Foot *v.* Baker, 5 Man. & G. 338.

(d) By 8 & 9 Vict. c. 109, ss. 2, 5, 8, provisions are made as to what shall be deemed sufficient evidence of keeping a common gaming house,

nagement thereof, and also every banker, croupier, and other person in any manner conducting the business of any common gaming house,—shall, on conviction by the oath of one witness, before two justices of the peace, be liable, in addition to the penalties of the Act of Henry the eighth, to pay such penalty (not being more than 500*l.*) as shall be adjudged by such justices: or, in their discretion, may be committed to the house of correction, with or without hard labour, for not more than twelve calendar months: with a proviso that nothing therein contained shall prevent any proceeding by indictment; but that, on the other hand, no person who has been so summarily convicted, shall be liable to be proceeded against, by indictment, for the same offence (*e*). It is also enacted, by these statutes, that every person who shall have been concerned in any unlawful gaming: and who shall be examined as a witness before any justice of the peace, or on the trial of any indictment or information against the owner, or keeper, or person having the care of any common gaming house, touching such unlawful gaming; and who shall make true discovery thereof to the best of his knowledge, and receive from the court a certificate of his having done so; shall be freed from all criminal prosecutions, forfeitures, and disabilities, for any thing done in respect of such unlawful gaming (*f*), And, on the other hand, that any person found in any house, room or place legally entered by the police, under a warrant, as a suspected gaming place (*g*), may be *required* to be examined and to give evidence touching any unlawful gaming therein, or touching any obstructions to the entry; and shall not be excused from being examined or from answering any question put to him touching such

or of gaming. By 16 & 17 Vict. c. 119, *betting houses* are declared to be common gaming houses.

(*e*) 8 & 9 Vict. c. 109, s. 4; 17 & 18 Vict. c. 38, s. 4.

(*f*) 8 & 9 Vict. c. 109, s. 9.

(*g*) Heavy pecuniary penalties are laid by 8 & 9 Vict. c. 109, and 17 & 18 Vict. c. 38, on such as unlawfully obstruct the authorized entrance of the police into suspected houses; or who, being found there, give false names or addresses.

matters, on the ground that his evidence will tend to criminate himself (*h*). The particular game of *billiards*, however, is lawful under certain restrictions; and it is by the same statute of 8 & 9 Vict. provided, that the justices of the peace, (at their special sessions, called the General Annual Licensing Meeting (*i*),) may grant annual billiard licences, to such persons as in their discretion they may deem fit to keep public billiard tables and bagatelle boards, or instruments used in any game of the like kind. But severe penalties are imposed on persons keeping such tables or boards without being duly licensed, or allowing play between one and eight in the morning on any day, or at any hour on Sunday, Christmas-day or Good Friday, or on any day of public Fast or Thanksgiving. And it is, by the same statute, further enacted, that every person who shall by any fraud, unlawful device, or ill practice,—in play, betting, or wagering at any game,—win any sum of money or valuable thing, shall be deemed guilty of obtaining the same by a false pretence, and be punished accordingly (*j*); and that all contracts, (whether by parol or in writing,) by way of gaming or wagering, shall be null and void (*k*); and that no suit at law or in equity, shall be brought to recover from a stakeholder, a deposit on a wager (*l*): with a proviso, however, that this enactment

(*h*) 17 & 18 Vict. c. 38, s. 5.

(*i*) 8 & 9 Vict. c. 109, s. 10; vide sup. vol. III. p. 293.

(*j*) 8 & 9 Vict. c. 109, s. 17. As to obtaining money by false pretences, vide sup. p. 217.

(*k*) 8 & 9 Vict. c. 109, s. 18; see Applegarth *v.* Colley, 10 Mee. & W. 723; Thorpe *v.* Coleman, 1 C. B. 990; Varney *v.* Hickman, 17 L. J. (C. B.) 102; Gatty *v.* Field, 9 Q. B. 431; Moon *v.* Durden, 2 Exch. 22. By 5 & 6 Will. 4, c. 41, (amending 9 Ann. c. 14,) all notes, bills, or mortgages, given for money won at play shall be deemed to be given on an illegal consideration; and are consequently void between the original parties: but they are not void in the hands of indorsees or purchasers for valuable consideration without notice. As to the above provision, see Hay *v.* Ayling, 20 L. J. (Q. B.) 171.

(*l*) As to this provision, see Varney *v.* Hickman, 5 C. B. 271. By 8 & 9 Vict. c. 109, s. 19, it is also provided, that in every case where any court of law or equity desires to have a question of fact decided by a jury, such question may be propounded in a direct form, and no longer on that of a *feigned issue* on

shall not be deemed to apply to any subscription towards a plate or prize at any lawful game, sport, pastime, or exercise (*m*). 5. [By statute 10 & 11 Will. III. c. 17, all *lotteries*, are declared to be public nuisances; and all grants, patents, or licences for the same, to be contrary to law (*n*);] and by 12 Geo. II. c. 28, 13 Geo. II. c. 19, and 18 Geo. II. c. 34, all private lotteries by tickets, cards, or dice, are specifically prohibited. State lotteries, however, were, for the purposes of revenue, continued to be authorized from time to time by successive Acts of parliament, until the 6 Geo. IV. c. 60, which utterly abolished them. 6. [The *making*, *selling*, and *firing*, *squibs* and *other fireworks* (*o*),—or throwing them about in any street,—is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance by statute 9 & 10 Will. III. c. 7;] and is punishable by fine, and may be prosecuted by indictment, either

a wager; as to which, vide sup. p. 50.

(*m*) As to *horse racing*, it may be observed, that it does not fall under any prohibitory enactment. By 13 Geo. 2, c. 19, indeed no plates or matches at horse races under 50*l*. value could be run under penalty of 200*l*. to be paid by the owner of the horse or horses, and 100*l*. by the advertiser of the plate; but this enactment was repealed by 3 & 4 Vict. c. 5. As to horse racing, and bets thereon, see Evans *v*. Pratt, 2 M. & G. 769; Thorpe *v*. Coleman, 1 Q. B. 990; Pugh *v*. Jenkins, 1 Q. B. 631; Bentinck *v*. Connop, 5 Q. B. 693; Applegarth *v*. Colley, 10 Mee. & W. 723; 18 Geo. 2, c. 34, s. 11. As to a *coursing match*, see Daintree *v*. Hutchinson, 10 Mee. & W. 85. A foot-race is a "lawful game" under this proviso; Batty *v*. Marriott, 5 C. B. 817. As to gaming houses see, (besides the statutes in the text,) Hawk. P. C. b. 1, c. 75, s. 6; 31 Eliz. c. 5, s. 7; 2 Geo. 2, c. 28, s. 9; 25 Geo. 2, c. 36, s. 5; 42 Geo. 3, c. 119; 2 & 3 Vict. c. 47, s. 48.

(*n*) As to lotteries, see also 9 Ann. c. 6, s. 56; 10 Ann. c. 26, s. 109; 8 Geo. 1, c. 2, ss. 36, 37; 9 Geo. 1, c. 19, ss. 4, 5; 6 Geo. 2, c. 35, ss. 29, 30; 22 Geo. 3, c. 47; 27 Geo. 3, c. 1; 46 Geo. 3, c. 148, s. 59; Allport *v*. Nutt, 3 D. & L. 233. As to the lotteries known by the name of *little goes*, vide 42 Geo. 3, c. 119, et Allport *v*. Nutt, ubi sup. As to *foreign lotteries*, vide 6 & 7 Will. 4, c. 66, and 8 & 9 Vict. c. 74. See also 9 & 10 Vict. c. 48, legalizing lotteries, for productions of art, in *Art Unions*.

(*o*) See also 2 & 3 Vict. c. 47, s. 54, as to discharging fireworks, &c., in the metropolitan district.

on the statute or at common law. [And to this head we may refer the *making*, *keeping* or *carrying* of too large a quantity of *gunpowder* at one time, or in one place or vehicle (*p*);] or using mills or engines for making gunpowder, except in places duly licensed; offences [which are prohibited by the 12 Geo. III. c. 61, under heavy penalties and forfeitures (*q*).] 7. *Eaves-dropping*,—or the offence committed by such [as loiter under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales,—is a common nuisance;] and the offenders are indictable at sessions, and are liable to be fined and bound over to their good behaviour. 8. Lastly, we must enumerate among nuisances noticed in our law, (though in practice it has long ceased to be the subject of prosecution,) that of being a *common scold*. [For which offence the *communis rixatrix*, (for our law confines it to the feminine gender,) may be indicted (*r*): and, if convicted, shall be sentenced to be placed in a certain engine of correction called the trebucket, castigatory or *cucking* stool: which, in the Saxon language, is said to signify the scolding stool: though now it is frequently corrupted into *ducking* stool; because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment (*s*).]

Such is the general state of the law, with respect to common nuisances; but it is material to add here that, as to all those species of them which tend to affect the public health, they are now very specially provided against by the several Acts for improving the sanatory condition of the

(*p*) See Rex *v.* Williams, E. 12 W. 3; R. *v.* Taylor, 2 Stra. 1167; R. *v.* Matters, 1 B. & Ald. 362.

(*q*) See also 54 Geo. 3, c. 159, s. 6; 14 & 15 Vict. c. 67. As to the seizing of unlawful quantities of gunpowder, see 3 & 4 Will. 4, c. 19, s. 36; 2 & 3 Vict. c. 47, s. 35. And see as to the careful manufacturing of fire-arms, 53 Geo. 3, c. 115. As to public nuisances arising from the keeping or using of dangerous materials generally, or from practising dangerous games, see Williams *v.* East India Company, 3 East, 200, 201; R. *v.* Moore, 3 B. & Ad 184.

(*r*) R. *v.* Foxby, 6 Mod. 213.

(*s*) Hawk. P. C. b. 1, c. 75, s. 5; 3 Inst. 219.

people, particularly the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Acts passed for its amendment and continuance (*t*); the Diseases Prevention Act, 1855 (18 & 19 Vict. c. 116); and The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121); by the provisions of which, respectively, a great variety of such nuisances are particularly described and prohibited: under the penalties of misdemeanor in some instances, and in others under pecuniary penalties recoverable before the justices of the peace. Any further detail of them, however, would be unsuitable to this place; and the rather, because the subject has been in part anticipated in a former volume (*u*).

IV. We shall next notice that offence with regard to the holy estate of matrimony (*v*) which is called *bigamy* (*w*); and which consists of a second marriage (*x*). by one having

(*t*) Vide sup. vol. III. p. 270, n. (*j*).

(*u*) Vide sup. vol. III. p. 270—273.

(*v*) As to offences against the laws relating to the manner of celebrating marriage, vide sup. vol. II. pp. 260, 268.

(*w*) Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other; or in once marrying a widow. Such were esteemed incapable of orders, &c.; and by a canon of the council of Lyons, A.D. 1274, held under Pope Gregory the tenth, were "*omni privilegio clericali nudati, et coërcioni fori secularis addicti.*"—(6 Decretal. l. 12.) This canon was adopted and explained in England by 4 Edw. 1, st. 3, c. 5; and *bigamy* thereupon became no uncommon counterplea to the claim of benefit of clergy. (M. 40 Ed. 3, 42; M. 11 Hen. 4, 11, 48; M. 13 Hen. 4, 6; Staundf. P. C. 134.) The cognizance of the plea of *bigamy* was declared by stat. 18 Edw. 3, st. 3, c. 2, to belong to the court christian, like that of *bastardy*. But by stat. 1 Edw. 6, c. 12, s. 16, *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21; Dy. 201. As to benefit of clergy, vide post, c. XXIII.

(*x*) Blackstone says (vol. iv. p. 163), that the offence of bigamy "is "more justly denominated *polygamy*, "or having a plurality of wives at "once;" and he objects to the term bigamy as corruptly applied to the case; because it "properly signifies "being twice married." The correctness of this criticism, however, seems questionable. For whatever the number of marriages that may have taken place, the substance of the charge always is, that having a lawful wife, (or husband,) still living, the offender marries a *second* time;—any intervening marriage being wholly immaterial and out of

a former husband or wife still living (*y*). Such second marriage [is simply void, and a mere nullity, by the ecclesiastical law of England: and yet the legislature has thought it just to make it a felony; by reason of its being so great a violation of the public economy and decency of a well ordered State. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations; the fallaciousness of which has been fully proved by many sensible writers: but in northern countries, the very nature of the climate seems to reclaim against it;—it never having obtained in this part of the world, even from the time of our German ancestors; who, as Tacitus informs us (*z*), "*prope soli barbarorum, singulis uxoribus contenti sunt.*" It is therefore punished by the laws, both of antient and modern Sweden, with death (*a*). And with us in England, it is enacted] by 9 Geo. IV. c. 31, s. 22 (*b*), that if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere,) every such offender shall be guilty of felony; and he is liable to penal servitude for not more than seven or less than three years, or to be imprisoned, with or without hard labour, for not more than two years (*c*). It is to be observed, however, [that the first wife, in this case, shall not be admitted as a witness against her

the case as far as the prosecution is concerned.

(*y*) 3 Inst. 88. It may be here observed, that for the purposes of the 20 & 21 Vict. c. 85, "to amend "the law relating to divorce and "matrimonial causes in England," the term "bigamy" is to be taken to mean "marriage of any person "being married, to any other person during the life of the former "husband or wife, whether the "second marriage shall have taken "place within the dominions of her "Majesty, or elsewhere."

(*z*) De Mor. Germ. 18.

(*a*) Stiernh. de Jure Sueon. l. 3, c. 2.

(*b*) This act repeals the former provisions on the subject, contained in 1 Jac. 1, c. 11.

(*c*) 9 Geo. 4, c. 31, s. 22; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. As to the form of indictment for bigamy, see Murray *v.* The Queen, 7 Q. B. 700.

[husband (*d*), because she is the true wife; though the second may, because she is indeed no wife at all (*e*); and so *vice versâ* of a second husband:] and it is held necessary to prove that the first marriage was duly solemnized; mere proof of cohabitation not being sufficient (*f*). This Act besides makes exception in four cases to which its provisions do not extend. 1. That of a second marriage contracted out of England, by any other than a subject of the realm (*g*). 2. That of any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past; and shall not have been known by such person to be living within that time. 3. That of a person who, at the time of such second marriage, shall have been delivered from the bond of the first marriage. 4. That of a person whose former marriage shall have been declared void, by the sentence of any court of competent jurisdiction (*h*). In reference, however, to the second of these cases, it is to be observed that the second marriage is, under the circumstances referred to, a nullity; although it be attended with no penal consequences.

V. *Lewdness* is also an offence against the public economy, when of an open and notorious character; as by [frequenting houses of ill-fame, which is an indictable offence: or by some grossly scandalous and public indecency; for which the punishment] at common law [is fine and imprisonment. In the year 1650,] when the republican party had the ascendant, [the repeated act of keeping a brothel, or committing fornication, was, upon a

(*d*) Vide sup. vol. II. p. 272; vol. III. p. 608.

(*e*) 1 Hale, P. C. 693; 1 East, P. C. c. 12, s. 9; Peat's case, 2 Lewin, 288.

(*f*) See R. v. James, R. R. C. C. 17; R. v. Morton, ibid. 19; R. v. Butler, ibid. 61; R. v. Bowen, 2 C. & K. 227.

(*g*) As to this exception see Topping's case, 1 Dearsley's C. C. R. 647.

(*h*) Duchess of Kingston's case, 11 St. Tr. 262; 1 Leach, 146; Hawk. P. C. b. 1, c. 42, s. 11.

[second conviction, made felony without benefit of clergy (*i*). But at the Restoration, when men,] from an abhorrence of what they deemed the hypocrisy of the late times, [fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And] the offence of lewdness was then abandoned [to the feeble coercion of the spiritual court, according to the rules of the canon law (*j*): a law which has treated the offence of incontinence with a great deal of tenderness and lenity; owing perhaps to the constrained celibacy of its first compilers (*k*).] To this head may be also properly referred, the offences of a public and indecent exposure of the person; and the public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition:—the punishment of which is fine or imprisonment, or both, with hard labour at the discretion of the court (*l*). Moreover, by 20 & 21 Vict. c. 83, any two justices (*m*), on complaint made, on oath, of the complainant's belief, that any obscene books, papers, writings, prints, pictures, drawings, or other representations, are kept in any place within the limits of their jurisdiction, for the purpose of being sold, distributed, exhibited, lent on hire, or otherwise published, for gain; and that one or more articles of the like character have been in any such manner published at or in connection with such place, so as to satisfy the justices that the belief is well founded, and that any of such

(*i*) Scob. 121. As to *adultery*, vide sup. vol. III. p. 528. It is remarked by Blackstone (vol. iv. p. 65), that at the period alluded to in the text, "incest and wilful adul-"tery were made capital crimes." This offence, and that of *drunkenness*, are treated of by him as offences against God and religion.

(*j*) Vide sup. p. 162, however, as to the offence of fraudulently procuring the defilement of young females.

(*k*) Proceedings in the ecclesiastical courts for incontinency have, in modern times, however, been out of use. (Vide sup. p. 2, note (*e*).)

(*l*) 14 & 15 Vict. c. 100, s. 29.

(*m*) The same powers are given by the Act (sect. 1) to any single metropolitan or stipendiary magistrate.

articles so kept are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such—may issue a special warrant authorizing the entry in the day time by the police of the place in question, by force if necessary; and the seizure and destruction, (if the owner does not, to their satisfaction, show cause to the contrary,) of the articles stated. An appeal, however, is given by this Act to any person aggrieved to the next general or quarter sessions(*o*).

VI. *Drunkenness* also may be referred to this head; [and is punished by statute 4 Jac. I. c. 5,] and 21 Jac. I. c. 7, sects, 1, 3, [with the forfeiture of five shillings,] to be paid, within one week after conviction, to the churchwardens, for the use of the poor: and upon a second conviction, the offender shall be bound with two sureties in 10*l.* for his good behaviour(*p*).

VII. A seventh offence, which properly ranks under this head, is that of *wanton and furious driving;* as to which, it is declared by 1 Geo. IV. c. 4, that if any person shall be maimed or otherwise injured, by reason of the wanton and furious driving or racing, or by the wilful misconduct, of any coachman, or other person having the charge of any

(*o*) 20 & 21 Vict. c. 82, s. 4.

(*p*) Under the head of public economy (says Blackstone, vol. iv. p. 170,) may also properly be ranked all sumptuary laws against *luxury,* and extravagant expenses in dress, diet, and the like. Concerning excess in apparel, there were formerly a multitude of penal laws existing,—chiefly made in the reigns of Edward the third, Edward the fourth, and Henry the eighth,—against piked shoes, short doublets, and long coats; all of which were repealed by stat. 1 Jac. 1, c. 25. But as to excess in diet, Blackstone goes on to remark, there still remained one antient statute unrepealed, (10 Edw. 3, st. 3,) which ordains that no man shall be served at dinner or supper with more than two courses; except upon some great holidays there specified, in which he may be served with three. This statute also was at length expressly repealed, by 19 & 20 Vict. c 64.

stage coach or other public carriage (*q*), the offender shall be guilty of a misdemeanor, and punishable as such by fine and imprisonment. This provision, however, must be taken as declaratory only of the common law; according to which it is a misdemeanor,—and may even amount to manslaughter or murder,—for any person to drive or ride so wantonly and furiously, as to endanger the passengers on the highway (*r*).

VIII. An eighth offence is that of *cruelty to animals;* it being enacted by 12 & 13 Vict. c. 92 (*s*) (amended by 17 & 18 Vict. c. 60), that if any person shall cruelly beat, ill-treat, over-drive, abuse, or torture any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog (*t*), cat, or any other domestic animal, he shall forfeit a sum not exceeding 5*l.* for every such offence, recoverable before a justice of the peace in a summary way; and if by any such misconduct he shall injure the animal, or any person or property, a further sum not exceeding 10*l.* to the owner, or person injured. The Acts also inflict penalties in the case of conveying any such animal in such a manner or position, as to subject it to unnecessary pain or suffering; and also in the case of bull baiting, cock fighting, and the like: and makes a variety of humane provisions for the regulation of the business of slaughtering horses, and other cattle not intended for butcher's meat (*u*). They contain also provisions for en-

(*q*) The Act does not apply to hackney coaches drawn by two horses, and not plying for hire as stage coaches.

(*r*) Fost. 263; see R. *v.* Mastin, 6 C. & P. 396; R. *v.* Taylor, 9 C. & P. 672. By the Acts relative to stage coaches, (as to which vide sup. vol. III. p. 276,) pecuniary penalties are also imposed in the case of furious driving.

(*s*) Previous Acts on the same subject, 3 Geo. 4, c. 71, and 3 Will. 4, c. 19, were repealed by 5 & 6 Will. 4, c. 59; and the Act last mentioned, by 12 & 13 Vict. c. 92.

(*t*) By 2 & 3 Vict. c. 47, (as extended by 17 & 18 Vict. c. 60, s. 2,) it is prohibited, under a penalty, to use any dog for the purposes of *draught.*

(*u*) See also the previous Act of

suring a proper supply of food and water, to animals *impounded* (*x*).

IX. Another misdemeanor against the public economy is that of *concealing a birth*. For by 9 Geo. IV. c. 31, s. 14 (*y*), it is enacted, that if any woman be delivered of a child; and shall, by secretly burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof; every such offender shall be guilty of a misdemeanor; and be liable to be imprisoned, with or without hard labour, for any term not more than two years: and it shall not be necessary to prove whether the child died before, at, or after its birth. It is also provided, that if any woman tried for the murder of her child shall be acquitted thereof; it shall be lawful for the jury, so acquitting her, to find her guilty (if the case be so) of concealing the birth: upon which the court may pass the same sentence, as if she had been convicted upon an indictment for the concealment (*z*).

7 & 8 Vict c. 87; and as to slaughterhouses, &c., 26 Geo. 3, c. 71.

(*x*) Vide sup. vol. III. p. 348.

(*y*) As to this provision, see Reg. *v.* Perry, 1 Dearsley's C. C. R. 471.

(*z*) The law on this subject was formerly different. For by 21 Jac. 1, c. 27, it was enacted, that if any woman was delivered of a child, which, if born alive, would have been by law a bastard, and endeavoured privately to conceal its birth, by burying the child or the like, the mother so offending should suffer death, as in the case of murder; unless she could prove, by one witness at least, that the child was actually born dead; a law as to which Blackstone remarks (vol. iv. p. 198), that, "though it savours pretty strongly "of severity, in making the conceal"ment of the death almost conclusive "evidence of the child's being mur"dered by the mother, it is never"theless also to be met with in the "criminal codes of many other na"tions of Europe,—as the Danes, "the Swedes and the French;" and he goes on to remark, that "it had "of late years been usual with us in "England, upon trials for this of"fence, to require some sort of pre"sumptive evidence that the child "was born alive; before the other "constrained presumption, — that "the child whose death is concealed "was therefore killed by its parent, "—is admitted to convict the pri"soner." This statute was after-

X. *Taking up dead bodies*, for the purpose of dissection or otherwise, is also a misdemeanor at common law, and punishable with fine and imprisonment (*a*). And under this head may also be noticed the offence, of *refusing to bury dead bodies* by those whose duty it is so to do; which appears to be punishable by the temporal courts, (independently of spiritual censures,) on indictment or information (*b*).

XI. *Refusing to serve a public office* (such as that of constable or overseer), without lawful excuse or exemption, is also a misdemeanor at common law, punishable with fine and imprisonment (*c*).

XII. Another offence, constituted by a variety of Acts of parliament, is that of [destroying such beasts and fowl

wards repealed by 43 Geo. 3, c. 58, which provided that the trials of women charged with the murder of any of their issue, which would by law be bastard, should proceed by the like rules of evidence and presumption as were allowed in other trials for murder; and it did not make concealment an indictable offence; but provided that it should be lawful for the jury, in acquitting the woman on an indictment for such murder as aforesaid, to find that she endeavoured to conceal the birth; and that the court might thereon sentence her to imprisonment, not exceeding two years. The statute last mentioned was, however, itself repealed by the statute in the text. We may remark here, that by 49 Geo. 3, c. 14, the *Scottish* act of parliament relating to bastard children (W. & M. Parl. 1, sess. 2) is repealed; and it is provided, that if any woman in Scotland shall conceal her being with child during the whole period of her pregnancy, and shall not call for and make use of help or assistance in the birth, and if the child be found dead or be missing,—the mother shall be imprisoned for a period not exceeding two years.

(*a*) Arch. Cr. Pr. 675; R. *v.* Lynn, 2 T. R. 733; 2 East's P. C. c. 16, s. 89; R. *v.* Duffin, R. & R. C. C. R. 365. As to obtaining bodies for dissection under the Anatomy Act, vide sup. vol. III. p. 305.

(*b*) Andrews *v.* Cawthorne, Willes, 527, n. a; and see Mastin *v.* Escott, decided May 8, 1841, by Sir H. Jenner Fust; and Kemp *v.* Wickes, 2 Phil. Rep. 264. As to the interment of dead bodies cast on shore from the sea, see 48 Geo. 3, c. 75.

(*c*) Arch. Cr. Pr. 679; R. *v.* Poynder, 1 B. & C. 178; R. *v.* Bower, ib. 587.

[as are ranked under the denomination of *game;*] concerning which, (considered as a species of *property,*) we had occasion in a former volume to enter into some discussion (*d*).

It will be necessary here, however, to add to what is there contained, some notice of the penal enactments relative to its destruction in the *night time.* By 9 Geo. IV. c. 69 (*e*), it is provided, that if any person shall, by night (*f*), unlawfully take or destroy any game or rabbits, in any land (whether open or enclosed); or on any public road, highway, or path, or the sides thereof; or at the openings, outlets or gates from any such lands into such roads; or shall, by night, be in such places, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game; he shall be liable to imprisonment, for the first offence, for any period not exceeding three months, with hard labour; and at the expiration of such period, to be bound over to his good behaviour by sureties for a year: or, in default of such recognizance, to be further imprisoned for six months, or until such sureties are found (*g*). For a second offence, such person shall be liable to imprisonment for six months, and then to be bound in sureties for two years; and, in default thereof, to be further imprisoned for one year, or until such sureties are found (*h*). And if he shall offend a third time, he is guilty of a misdemeanor; and he is then liable to penal servitude for not more than seven or less than three years, or to be imprisoned with hard labour, for any time not exceeding two years (*i*). It is moreover provided, that when any person shall be found committing such offence, it shall be lawful for the owner or occupier of the land; or for any

(*d*) Vide sup. vol. II. pp. 5, 20.

(*e*) This statute was amended by 7 & 8 Vict. c. 29.

(*f*) By 9 Geo. 4, c. 69, s. 12, the *night* for the purpose of this provision, shall be considered to commence at the expiration of one hour after sunset, and to conclude at the beginning of the last hour before sunrise.

(*g*) 9 Geo. 4, c. 69, s. 1.

(*h*) Ibid.

(*i*) Ibid.; 7 & 8 Vict. c. 29; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

person having a right of free warren or free chase therein; or for the lord of the manor; or for the gamekeeper or servant of such persons or their assistants;—to seize and apprehend such person so offending; and in case such offender shall assault or offer any violence with any offensive weapon whatsoever, towards any person so authorized to apprehend him, he is guilty of a misdemeanor; and he is, in that case, liable to penal servitude for not more than seven or less than three years, or to be imprisoned, with hard labour, for any term not exceeding two years (*j*).

It is further enacted, that if any persons, to the *number of three or more*, shall, by night, unlawfully enter such lands or roads, for the purpose of taking or destroying game or rabbits (any of them being armed with any gun or other offensive weapon), each of such persons shall be guilty of a misdemeanor (*k*): and be liable to penal servitude for any term not more than fourteen years, or less than three years; or to be imprisoned, with hard labour, for not more than three years (*l*).

XIII. Lastly, under the general head of *vagrancy and other disorderly conduct*, may be classed a variety of offences against the public economy (*m*). [The civil law expelled all sturdy vagrants from the city (*n*); and in our own law all idle persons or vagabonds, whom our antient statutes describe to be, "such as wake on the night and sleep on the "day, and haunt customable taverns and alehouses, and

(*j*) 9 Geo. 4, c. 69, s. 1; 7 & 8 Vict. c. 29; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*k*) 9 Geo. 4, c. 69, s. 9.

(*l*) Ibid.; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. See the following cases as to the construction of 9 Geo. 4, c. 69, s. 9; R. *v.* Dowsell, 6 Car. & P. 398; R. *v.* Gainer, 7 Car. & P. 231; R. *v.* Kendrick, ibid. 184; R. *v.* Davis, 8 Car. & P. 759; R. *v.* Fry, 2 M. & Rob. 42; Fletcher *v.* Calthrop, 6 Q. B. 880; R. *v.* Jones, 2 Cox's Cr. C. 185; R. *v.* Merry, ibid. 240; R. *v.* Whitaker and others, 17 L. J. (M. C.) 127; R. *v.* Uezzell and others, 20 L. J. (M. C.) 192.

(*m*) Vide sup. vol. III. p. 214, as to 20 & 21 Vict. c. 48, enabling children above the age of seven and under fourteen, taken into custody on a charge of vagrancy under any local or general Act, to be sent to an *industrial school*.

(*n*) Nov. 80, c. 5.

[" routs about; and no man wot from whence they come, " ne whither they go;"] or such as are more particularly described by statute 5 Geo. IV. c. 83, (amended by 1 & 2 Vict. c. 38,) and divided into three classes, *idle* and *disorderly* persons, *rogues* and *vagabonds*, and *incorrigible rogues*;—all these are [offenders against the good order, and blemishes in the government, of any kingdom.] They are therefore all punished by the statute first mentioned (*o*): that is to say, idle and disorderly persons, with one month's imprisonment, and hard labour: rogues and vagabonds with three months' imprisonment, and hard labour: and incorrigible rogues (*p*), may be committed to the next ses-

(*o*) By other statutes, also, persons committing particular offences of various kinds are to be deemed *idle and disorderly persons*, &c. within the statute referred to in the text, and punished accordingly.

(*p*) In 5 Geo. 4, c. 83, ss. 3, 4, 5, the species of offenders comprised in the three general appellations of *idle and disorderly persons*, *rogues and vagabonds*, and *incorrigible rogues*, are particularly defined. But the enumeration is too long for insertion. As to this statute, see also Ex parte Jones, 21 L. J. (M. C.) 116; Ex parte Brown, 21 L. J. (Q. B.) 216. We may remark that under it, two classes of offenders seem to be now punishable, who were formerly treated by our law with much more severity. 1. *Idle soldiers and marines*, or persons pretending to be *soldiers or marines, wandering about the realm.* Such persons were deemed under the statute 39 Eliz. c. 17, (repealed by 52 Geo. 3, c. 31,) to be *ipso facto* guilty of a capital felony. 2. *Outlandish persons calling themselves Ægyptians or Gypsies.* Against these, provisions were made by 1 & 2 Ph. & M. c. 4, and 5 Eliz. c. 20, by which if the gypsies themselves, or if any person, being fourteen years old, who had been seen or found in their fellowship, or had disguised himself like them, remained in this kingdom one month, it was felony; and we are informed by Sir M. Hale (1 Hale, P. C. 671), that at one Suffolk assizes no less than thirteen gypsies were executed upon these statutes. But they are now repealed by 23 Geo. 3, c. 51, and 1 Geo. 4, c. 116. (See also 19 & 20 Vict. c. 64.) Blackstone remarks (vol. iv. p. 165), as to gypsies, that "they are a strange kind "of commonwealth among them- "selves of wandering impostors and "jugglers, who were first taken "notice of in Germany about the "beginning of the fifteenth century, "and have since spread themselves "all over Europe. Munster, who is "followed and relied upon by Spel- "man and other writers, fixes the "time of their first appearance to "the year 1417, under passports, "real or pretended, from the Em- "peror Sigismund, king of Hungary. "And Pope Pius the second, (who "died A.D. 1464,) mentions them in "his history as thieves and vaga-

sions, and kept to hard labour in the interim; and may be further punished by the sessions of the peace with imprisonment and hard labour for one year, and with whipping, except in the case of females (*q*).

"bonds, then wandering with their "families over Europe under the "name of Zigari; and whom he supposes to have migrated from the "country of the Zigi, which nearly "answers to the modern Circassia. "In the compass of a few years they "gained such a number of idle proselytes (who imitated their language and complexion, and betook "themselves to the same arts of "chiromancy, begging and pilfering), that they became troublesome, and even formidable, to most "of the states of Europe. Hence "they were expelled from France in "the year 1560, and from Spain in "1591. And the government in "England took the alarm much "earlier; for in 1530 they are described by statute 22 Hen. 8, c. 10, "as outlandish people calling themselves Egyptians, using no craft "nor feat of merchandize, who have "come into this realm, and gone "from shire to shire, and place to "place, in great company, and used "great subtle and crafty means to "deceive the people; bearing them "in hand, that they by palmestry "could tell men and women's fortunes; and so, many times, by craft "and subtilty have deceived the people of their money; and also have "committed many heinous felonies "and robberies." Much more recent information, however, as to the origin and history of the Gypsies, will be found in the work of Mr. Borrow, called "Zincali," published in 1841.

(*q*) By 5 Geo. 4, c. 83, s. 13, houses of reception for travellers, may be searched for vagrants, &c. and the suspected parties may be carried before a magistrate.

CHAPTER XIII.

OF THE MEANS OF PREVENTING OFFENCES.



[WE are now arrived at the fifth general branch or head (*a*), under which we were to consider the subject of this Book of our Commentaries; viz., the means of *preventing* the commission of crimes and misdemeanors: and really it is an honour, and almost a singular one to our English laws, that they furnish a title of this sort; since *preventive* justice is, upon every principle of reason, of humanity and of sound policy, preferable, in all respects, to *punishing* justice (*b*); the execution of which, though necessary, and in its consequence a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

This preventive justice consists of obliging those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen: by finding pledges, or securities, for keeping the peace: or for their good behaviour.]

[By the Saxon constitutions these sureties were always at hand, by means of King Alfred's wise institution of decennaries or frank pledges; wherein, as has more than once been observed (*c*), the whole neighbourhood, or tything, of freemen were mutually pledges for each other's good behaviour. But this great and general security being now fallen into disuse and neglected, there hath succeeded to it

(*a*) Vide sup. p. 76.
(*b*) Beccar. ch. 41.
(*c*) Vide sup. vol. I. p. 123.

[the method of making suspected persons find particular and special securities for their future conduct; of which we find mention in the laws of King Edward the Confessor (*d*); "*tradet fidejussores de pace et legalitate tuendâ* (*e*)."

This security] is either for ***keeping the peace***, or for ***good behaviour***; and [consists in being bound with one or more securities in a recognizance (*f*) or obligation] to the Crown, [and taken in some court, or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the Crown in the sum required, (for instance 100*l*.,) with condition to be void and of none effect if the party shall appear in court on such a day, and in the mean time shall keep the peace either generally, towards the sovereign and all his liege people; or particularly also, with regard to the person who craves the security:] or on condition so to keep the peace for a certain period, not dependent on any appearance in court (*g*). [Or, if it be for the good behaviour,—then on condition that he shall demean and

(*d*) Cap. 18.

(*e*) It is said in Willis *v.* Bridges, 2 B. & Ald. 287, that the authority of a justice of the peace, to take security for the peace, appears to have had its origin in stat. 1 Edw. 3, st. 2, c. 16; and that this authority is more fully set forth in 34 Edw. 3, s. 1.

(*f*) As to *recognizances* generally, vide sup. vol. II. p. 141. It may be remarked here, that in all cases where a justice of the peace is authorized to bind a person, or make him give security, he may do so by *recognizance*. (2 Arch. Just. 350.) And such cases may arise, under other circumstances than those mentioned in the text. Thus, the justice or justices before whom any person has been charged with any indictable offence, and witnesses in support of such charge examined, may bind, by recognizance, the prosecutor and every such witness to prosecute and give evidence, (11 & 12 Vict. c. 42, s. 20; see also ss. 21, 22, 23, 34): and in the case of any charge or complaint made of any offence punishable by way of summary conviction, may also bind over the defendant, in the same manner, to appear at the hearing (11 & 12 Vict. c. 43, s. 3. See also ss. 9, 13, 16, 20). See also 19 & 20 Vict. c. 16, ss. 8—10, 22, 23, as to recognizances taken before justices in cases where an indictment or inquisition has been removed for trial to the Central Criminal Court.

(*g*) Where taken for appearance in court (as it usually is), the justice must, by 3 Hen. 7, c. 1, certify the recognizance to the next session, there to remain of record. Vide Willis *v.* Bridges, ubi sup.

[behave himself well, or be of good behaviour, either generally or specially, for the time therein limited; as for one or more years, or for life (*h*): and if the condition of such recognizance be broken, by any breach of the peace in the one case; or by any misbehaviour, in the other; the recognizance becomes forfeited or absolute:] and the party and his sureties become the Crown's absolute debtors, for the several sums in which they are respectively bound (*i*).

[Any justices of the peace, by virtue of their commission; or those who are *ex officio* conservators of the peace, as was mentioned in a former volume (*k*); may demand such security according to their own discretion: or it may be granted at the request of any subject, upon due cause shown,—provided such demandant be under the Crown's protection: for which reason it has been formerly doubted whether Jews, pagans, or persons convicted of a *præmunire*, were entitled thereto (*l*). Or if the justice is averse to act, it may be granted by a mandatory writ, called a *supplicavit*—issuing out of the court of Queen's Bench or Chancery—which will compel the justice to act as a ministerial, and not as a judicial, officer; and he must make a return of such writ, specifying his compliance, under his hand and seal (*m*). But this writ is seldom used; for when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. I. c. 8.] And in this case, as well as where application is made to the court of quarter sessions, it is

(*h*) Hawk. P. C. b. 1, c. 60, s. 15.

(*i*) As to the manner of proceeding to enforce forfeited recognizances, in these and other cases, see 3 Geo. 4, c. 46; 4 Geo. 4, c. 37; 7 Geo. 4, c. 64, s. 31; 3 & 4 Will. 4, c. 99, s. 25; 16 & 17 Vict. c. 30, s. 2; 20 & 21 Vict. c. 43, s. 13; R. *v.* Justices of West Riding, 7 A. & E. 583. As to the discharge of such recognizances, see also the same authorities, and Hawk. P. C. b. 1, c. 60, s. 17; R. *v.* Twyford, 5 B. & Ad. 430.

(*k*) Vide sup. vol. II. p. 648. A secretary of state or privy councillor, however, cannot bind to keep the peace or good behaviour. (11 St. Tr. 317.)

(*l*) Hawk. P. C. b. 1, c. 60, s. 3.

(*m*) F. N. B. 80; Clavering's case, 2 P. Wms. 202.

founded upon *articles* first exhibited in court, and supported by the oath of the exhibitant (*n*); the truth of which articles cannot be controverted (*o*). But where the parties live in the country at a distance from London, the Court of Queen's Bench will not in general entertain an application of this description; which it is usual, in such case, to make to a justice of the peace in the neighbourhood, or to the court of quarter sessions (*p*). A peer or peeress, however, [cannot be bound over in any other place than the Courts of Queen's Bench or Chancery; though a justice of the peace has a power to require sureties of any other person, being *compos mentis* and under the degree of nobility,—whether he be a fellow justice or other magistrate, or whether he be merely a private man (*q*). Wives may demand it against their husbands, or husbands (if necessary) against their wives (*r*). But femes covert, and infants, ought to find security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowledgments.]

Thus far, what has been said is applicable to both species of recognizances; for the *peace* and for the *good behaviour*. [But as these two species of securities are in some respects different,—especially as to the cause of granting or the means of forfeiting them,—it may be useful next to consider them separately.

1. Any justice of the peace may *ex officio* bind] by recognizances, with sureties to keep the peace, all [who in his presence make any affray, or threaten to kill or beat one another; or who contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the people: and all such as he knows to be common barrators; and such as are brought before him

(*n*) Vide Ex parte Williams, M'Clel. 493; 12 Price, 673; Regina *v.* Mallinson, 1 L. M. & P. 619.

(*o*) R. *v.* Doharty, 13 East, 171.

(*p*) R. *v.* Waite, 2 Burr. 780; Chitty's Burn, Surety of the Peace.

(*q*) Hawk. P. C. b. 1, c. 60, s. 5.

(*r*) Sim's case, 2 Stra. 1207.

[by the constable for a breach of the peace in his presence: and all such persons as having been before bound to the peace, have broken it, and forfeited their recognizances (s). Also wherever any private man has just cause to fear that another will burn his house; or do him a corporal injury, by killing, imprisoning, or beating him; or that he will procure others so to do;—he may demand surety of the peace against such person; and every justice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will show that he has just cause to be so by reason of the other's menaces, attempts, or having lain in wait for him (t); and will also further swear that he does not require such surety out of malice, or for mere vexation (u). This is called *swearing the peace* against another; and if the party does not find such sureties, he may immediately be committed till he does (x)]. It is however provided by 16 & 17 Vict. c. 30, s. 3, that no person committed to prison for such cause, under any warrant or order of one justice of the peace, shall be detained there for a longer period than twelve calendar months.

[Such recognizance for keeping the peace, when given, may be forfeited by any actual violence,—or even an assault, or menace, to the terror of him who demanded it,—if it be a special recognizance; or if the recognizance be general, by any unlawful action whatever that either is or tends to be a breach of the peace; or more particularly, by any one of the many species of offences which were mentioned as crimes against the public peace, in the tenth chapter of this Book; or by any private violence, committed against any of the subjects of the Crown. But a bare trespass upon the lands or goods of another,—which is a ground for a civil action,—unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance (y). Neither

(s) Hawk. P. C. ubi sup. s. 1.

(t) Vide Ex parte Hulse, 21 L. J. (M. C.) 21.

(u) Hawk. P. C. ubi sup. s. 8.

(x) Ibid. s. 9. See Prickett v. Gratrex, 8 Q. B. 1020.

(y) Hawk. P. C. ubi sup. s. 25.

[are mere reproachful words, as calling a man knave or liar, any breach of the peace, so as to forfeit one's recognizance, (being looked upon to be merely the effect of unmeaning passion and heat,) unless they amount to a challenge to fight (*z*).

2. The other species—viz. a recognizance, with sureties, for the *good abearance* or *good behaviour*, includes security for the peace and somewhat more: we will therefore examine it, in the same manner as the other.

First, then, the justices are empowered by the statute, 34 Edward III. c. 1, to bind over to the good behaviour towards the sovereign and his people, all them *that be not of good fame*, wherever they be found: to the intent that the people be not troubled or endamaged; nor the peace diminished; nor merchants and others passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame*, it is holden, that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem;* as for haunting bawdy houses with women of bad fame, or for keeping such women in his own home: or for words tending to scandalize the Government; or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day and wake in the night; common drunkards, whore masters; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute,—as persons not of good fame; an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But if he commits a man for want of sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good

(*z*) Hawk. P. C. ubi sup. s. 22.

one (*a*).] And a similar limitation as to the time of detention under the warrant or order of a single justice, is prescribed by 16 & 17 Vict. c. 30, s. 4, as just mentioned in reference to binding over to keep the peace.

[A recognizance for the good behaviour may be forfeited by all the same means, as one for the security of the peace may be: and also by some others;—as by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of misbehaviour which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion, of that which perhaps may never actually happen (*b*); for though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.]

Such are the doctrines laid down in the books with respect to recognizances for *good behaviour*. In what manner, however, and to what extent the provisions of the 34 Edward III. ought at the present day to be enforced, may be doubtful: and justices, even at sessions, are recommended, by a learned writer on the subject, to refrain from acting under this statute, where no complaint, requiring such recognizance to be taken, has been made; except only in cases where a conviction for some offence of a dangerous kind has taken place; and the circumstances are such as to render a repetition of it, by the same offender, probable (*c*).

(*a*) Hawk. P. C. b. 1, c. 62, s. 4.

(*b*) Ibid. s. 5.

(*c*) 2 Arch. Just. 454. It is provided by 16 & 17 Vict. c. 30, s. 1, that on conviction of such aggravated assault on a female or child as there mentioned, (vide sup. p. 397,) the offender may be bound over both to keep the peace and to good behaviour for six months after the expiration of his sentence.

CHAPTER XIV.

OF COURTS OF A CRIMINAL JURISDICTION.



[THE sixth and last object of our inquiries (a) will be the method of *inflicting* those punishments, which the law has annexed to particular offences; and which, in this treatise, have been constantly subjoined to the description of the crime itself. In the discussion of which, we shall pursue the same general method that was followed in the preceding Book, with regard to the redress of civil injuries: first, pointing out the several courts of criminal jurisdiction wherein offenders may be prosecuted to punishment: and secondly, deducing down, in their natural order, and explaining, the several proceedings therein.

First, then, in reckoning up the several courts of criminal jurisdiction, we shall, (as in the former case,) begin with an account of such as are of a public and general jurisdiction throughout the whole realm; and afterwards proceed to such as are only of a private and special jurisdiction, and confined to some particular parts of the kingdom.

1. As to the criminal courts of public and general jurisdiction;—with regard to which we shall, in one respect, pursue a different order, from that in which we considered the civil tribunals. For there, as the several courts had a gradual subordination to each other,—the superior correcting and reforming the errors of the inferior,—it seemed proper to begin with the lowest, and to ascend gradually to the courts of appeal, or those of the most extensive

(a) Vide sup. p. 74.

[powers. But as it is contrary to the genius and spirit of the law of England to suffer any man, twice to be tried for the same offence in a criminal way, especially if acquitted upon the first trial,—therefore these criminal courts may be said to be all independent of each other; at least so far as that the sentence of the lowest of them can never be controlled or reversed by the highest jurisdiction in the kingdom, unless for error in matter of law (*b*); though sometimes causes may be removed from one to the other, before trial; and, therefore, as in these courts of criminal cognizance, there is not the same chain and dependence as in the others, it is proposed to rank them according to their dignity, and begin with the highest of all, viz.—

1. The High Court of *Parliament;* which is the supreme court in the kingdom, not only for the making, but also for the execution of laws, by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for Acts of parliament to attaint particular persons of treason or felony,—or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose,—we speak not of them; such being to all intents and purposes new laws, made *pro re natâ,* and by no means an execution of such as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put into practice,—being a presentment to the most high and supreme court of criminal jurisdiction, by the most solemn grand inquest of the whole kingdom (*c*). A commoner cannot, however, be impeached before the lords for any capital offence, but only for high misde-

(*b*) As to reserving questions of law, arising at assizes or sessions, for the consideration of the judges, see 11 & 12 Vict. c. 78. And as to cases stated by justices of the peace, on the application of any one aggrieved by their determination in point of law, or any information or complaint, see 20 & 21 Vict. c. 43.

(*c*) 1 Hale, P. C. 150.

[meanors (*d*); a peer may be so impeached, for any crime. And they usually, (in cases of an impeachment of a peer for treason,) address the Crown to appoint a Lord High Steward, for the greater dignity and regularity of the proceedings; which High Steward was formerly elected by the peers themselves, though he was generally commissioned by the sovereign; but it hath] in modern times [been strenuously maintained, that the appointment of a High Steward in such cases is not indispensably necessary,

(*d*) When, in the fourth year of Edward the third, the king demanded the earls, barons and peers to give judgment against Simon de Bereford, who had been a notorious accomplice in the treasons of Roger Earl of Mortimer, they came before the king in parliament and said all with one voice, that the said Simon was not their *peer;* and therefore they were not bound to judge him as a peer of the land; and when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and give judgment against him, the following protest and proviso was entered in the parliament roll:—"And it is as-"sented and recorded by our lord "the king, and all the great men, "in full parliament, that albeit the "peers as judges of the parliament, "have taken upon them, in the pre-"sence of our lord the king, to make "and render the said judgment; yet "the peers who now are, or shall be "in time to come, be not bound or "charged to render judgment upon "others than peers; nor that the "peers of the land have power to do "this, but thereof ought ever to be "discharged and acquitted; and "that the aforesaid judgment now "rendered, be not drawn to example "or consequence in time to come, "whereby the said peers may be "charged hereafter to judge others "than their peers, contrary to the "laws of the land, if the like case "happen, which God forbid." (Rot. Parl. 4 Edw. 3, n. 2 and 6; 2 Brad. Hist. 190; Selden, Judic. in Parl. c. 1.) But Mr. Christian says, that according to the last resolution of the house of lords, a commoner *may* be impeached for a capital offence, and he states the following authorities. On the 20th of March, 1680, Edward Fitzharris, a commoner, was impeached by the commons of high treason. Upon which the attorney-general acquainted the peers, that he had an order from the king to prosecute Fitzharris by indictment; and a question thereupon was put, whether he should be proceeded against according to the course of the common law, or by way of impeachment, and it was resolved against proceeding in the impeachment. (13 Lords' Journ. p. 755.) Fitzharris was afterwards prosecuted by indictment, and he pleaded in abatement that there was an impeachment pending against him for the same offence; but this plea was overruled, and he was con-

[but that the House may proceed without one (*e*). The articles of impeachment are a kind of bill of indictment, found by the house of common, and afterwards tried by the house of lords; who are, in cases of misdemeanor, considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the antient Germans; who, in their great councils, sometimes tried capital accusations relating to the public: "*licet apud consilium accusare quoque, et discrimen capitis intendere* (*f*)." And it has a peculiar propriety in the English constitution, which has much improved upon the antient model, imported hither from the continent. * For, though, in general, the union of the legislative and judicial powers ought to be most carefully avoided: yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people; and be guilty of such crimes as the ordinary magistrate, either dares not or cannot punish. Of these the representatives of the people, or house of commons, cannot properly *judge*; because their constituents are

victed and executed. But on the 26th of June, 1689, Sir Adam Blair, and four other commoners, were impeached for high treason, in having published a proclamation of James the second. On the 2nd of July a long report of precedents was produced, and a question was put to the judges, whether the record 4 Edw. 3, n. 6, was a statute. They answered, as it appeared to them by the copy, they believed it to be a statute; but if they saw the roll itself, they could be more positive. It was then moved to ask the judges (but the motion was negatived), whether by this record the lords were barred from trying a commoner for a capital crime upon an impeachment of the commons; and they immediately resolved to proceed in this impeachment, notwithstanding the parties were commoners, and charged with high treason. (14 Lords' Journ. p. 260.) But the impeachment was not prosecuted with effect, on account of an intervening dissolution of the parliament.—(Christian's Blackstone, *in notis.*) See also Lives of the Chancellors, by Lord Campbell, vol. iii. p. 357, n., and the observations of Mr. May on this subject, in his Practice of Parliament.

(*e*) As to the appointment of the High Steward, see 1 Hale, P. C. 350; Lords' Journ. 12th May, 1679; Com. Journ. 15th May, 1679; Fost. 142, &c.

(*f*) Tacit. De Mor. Germ. 12.

[the parties injured: and therefore can only *impeach.* But before what court shall this impeachment be tried? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason, therefore, will suggest, that this branch of the legislature, which represents the people, must bring its charge before the other branch,—which consists of the nobility,—who have neither the same interests nor the same passions as popular assemblies (*h*). This is a vast superiority, which the constitution of this island enjoys, over those of the Grecian or Roman republics; where the people were, at the same time, both accusers and judges. It is proper that the nobility should judge, to ensure justice to the accused; as it is proper that the people should accuse, to ensure justice to the commonwealth. And, therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature; which was insisted upon by the house of commons in the case of the Earl of Danby, in the reign of Charles the second (*i*);] and which is now established by the Act of Settlement (*k*); viz. [that no pardon under the Great Seal shall be pleadable to an impeachment by the commons of Great Britain in parliament,] so as to prevent its further prosecution (*l*); though such a pardon would be pleadable, (as we shall see hereafter,) in the ordinary case of an indictment.

2. [The Court of the *Lord High Steward* of Great Britain, is a court instituted for the trial of peers indicted for treason or felony (*m*); or for misprision of either (*n*). The office of this great magistrate is very antient; and was formerly hereditary, or at least held for life, or *dum bene se gesserit:* but now it is usually, and hath been for many centuries past (*o*), granted *pro hâc vice* only; and it

(*h*) Montesq. Sp. L. xi. 6.

(*i*) Com. Journ. 5th May, 1679.

(*k*) 12 & 13 Will. 3, c. 2.

(*l*) As to pardons, vide post, c. xxv

(*m*) 4 Inst. 58; Hawk. P. C. b. 2, c. 2, s. 44; 2 Jon. 54.

(*n*) R. *v.* Lord Vaux, 1 Bulst. 198.

(*o*) Pryn. on 4 Inst. 46.

[hath been the constant practice, (and therefore seems now to have become necessary,) to grant it to a lord of parliament, else he is incapable to try such delinquent peer (*p*). When such an indictment is, therefore, found by a grand jury of freeholders in the queen's bench; or at the assizes before a judge of *oyer and terminer;* it is to be removed by a writ of *certiorari* into the Court of the Lord High Steward (*q*): which, only, has power to determine it.] But this is only in case the offence be of the description before mentioned, viz. treason, felony, or misprision of treason or felony; for if it be of any other kind, the privilege does not exist, and the peer must be tried by jury (*r*). [A peer may plead a pardon before the court of Queen's Bench: and the judges have power to allow it; in order to prevent the trouble of appointing a High Steward, merely for the purpose of receiving such plea. But he may not plead, in that inferior court, any other plea; as *guilty* or *not guilty*, of the indictment; but only in the court of the Lord High Steward: because in consequence of such plea, it is possible that judgment of death might be awarded against him. The sovereign, therefore, in case a peer be indicted for treason, felony, or misprision, creates a Lord High Steward, *pro hâc vice,* by commission under the Great Seal; which recites the indictment so found, and gives his Grace power to receive and try it, *secundum legem et consuetudinem Angliæ.* Then, when the indictment is regularly removed by writ of *certiorari,* commanding the inferior court to certify it up to him,—the Lord High

(*p*) "*Quand un seigneur de parlement serra arrein de treason ou felony, le roy par ses lettres patents fera un grand et sage seigneur d'estre le grand seneschal d'Angleterre: qui doit faire un precept, pur faire venir xx seigneurs, ou xviii,*" &c. (Yearb. 13 Hen 8, 11.) See Staundf. P. C. 152; 3 Inst. 28; 4 Inst. 59; Hawk. P. C. b. 2, c. 2; Barr. 234.

(*q*) Lord Coke says, (3 Inst. 30,) "that this privilege cannot be "waived by the peer indicted;" but Hawkins (P. C. b. 2, c. 44, s. 19) holds that it is waived if he puts himself upon his country; that is, pleads not guilty, and refers the issue to a trial by jury.

(*r*) 2 Inst. 49; 3 Inst. 28, 30; R. *v.* Lord Vaux, 1 Bulst. 197.

[Steward directs a precept to a serjeant-at-arms, to summon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty selected from the body of the peers; then the number came to be indefinite; and the custom was, for the Lord High Steward to summon as many as he thought proper, (but latterly not less than twenty-three (*s*);) and that those lords only, should sit upon the trial: which threw a monstrous weight into the hands of the Crown and this its great officer, of selecting only such peers as the then predominant party should most approve of; and accordingly, when the Earl of Clarendon fell into disgrace with Charles the second, there was a design formed to prorogue the parliament, in order to try him by a select number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court (*t*).

But now by statute 7 Will. III. c. 3, upon all trials of peers for treason or misprision,—all the peers who have a right to sit and vote in parliament shall be summoned, at least twenty days before such trial, to appear and vote therein: and every lord appearing,] and taking the proper oaths, [shall vote in the trial of such peer (*u*).] The decision in this court, is by the majority; but a majority cannot convict, unless it consists of twelve or more (*x*).

(*s*) Kelynge, 56.

(*t*) Carte's Life of Ormonde, vol. ii.

(*u*) As a peer cannot have the benefit of a challenge like a commoner, (1 Harg. St. Tr. 198, 388,) it is somewhat surprising that this manifest improvement of the law and constitution, was not extended to trials of peers for all felonies in the court of the lord high steward. Lord Mountmorris informs us that there are but two instances of the trials of peers in Ireland, viz. Viscount Netterville in 1743, and of Lord Santry about the same time; the first was tried in the high court of parliament, the latter in the court of the high steward: they were both indicted for murder. Lord Netterville was acquitted; Lord Santry was convicted, but pardoned as to his life. Upon Lord Santry's trial all the peers were summoned; though the regulation of the seventh year of William the third, was not introduced into Ireland till the year 1773. Lord Mountm. vol. ii. p. 197. (Christian's Blackstone.)

(*x*) Christian's Blackstone, vol. iv. p 262, note.

[During the session of parliament, the trial of an indicted peer is not properly in the court of the Lord High Steward;] but, before the high court of parliament (*y*). [It is true, a Lord High Steward is always appointed in that case, to regulate and add weight to the proceedings; but he is rather in the nature of a speaker *pro tempore;* or chairman of the court, than the judge of it: for the collective body, the peers, are therein the judges both of law and fact; and the High Steward has a vote with the rest, in right of his peerage. But in the court of the Lord High Steward, which is held in the recess of parliament, he is the sole judge of matters of law, as the lords triors are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial (*z*). Therefore, upon the conviction and attainder of a peer for murder in full parliament,—it hath been holden by the judges (*a*), that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament (during its sitting), though no High Steward be existing: or, (in the recess of parliament,) by the Court of Queen's Bench, the record being removed into that court.

It has been a point of some controversy, whether the bishops have now a right to sit in the court of the Lord High Steward, to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of King William (*b*), "all peers who have a right to sit and vote in parliament," but the expression had been much clearer if it had been "all *lords*," and not "all *peers;*" for though bishops, on account of the baronies annexed to their bishoprics, are clearly lords of parliament, yet, their blood not being ennobled, they are

(*y*) Vide sup. p. 364; Fost. 141.
(*z*) St. Tr. vol. iv. 214, 232, 233; 3 Lord Campb. L. of Chan. 557, n.
(*a*) Fost. 139.
(*b*) 7 Will. 3, c. 3.

[not universally allowed to be peers with the temporal nobility; and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments and indictments in full parliament, much less in the court we are now treating of: for indeed they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that in the eleventh chapter of the Constitutions of Clarendon, made in the parliament of the eleventh year of Henry the second, they are expressly excused, rather than excluded, from sitting and voting on trials, when they come to concern life or limb: "*episcopi, sicut cæteri barones, debent interesse judiciis cum baronibus, quousque perveniatur ad diminutionem membrorum, vel ad mortem:*" and Becket's quarrel with the king hereupon, was not on account of the exception (which was agreeable to the canon law,) but of the general rule, which compelled the bishops to attend at all. And the determination of the house of lords in the Earl of Danby's case (*c*), which has ever since been adhered to, is consonant to these constitutions; "that the lords spiritual have a right to stay and sit in court in capital cases, "till the court proceeds to the vote of guilty, or not "guilty (*d*)." It must be noted that this resolution extends only to trials *in full parliament;* for to the court of the Lord High Steward, (in which no vote can be given, but merely that of guilty or not guilty,) no bishop, as such, ever was or could be summoned; and though the statute of King William regulates the proceedings in that court as well as in the court of parliament, yet it never intended to new-model or alter its constitution; and consequently does not give the lords spiritual any right in cases of

(*c*) Lords' Journ. 15 May, 1679.

(*d*) This applies, it will be observed, only to judicial proceedings. Where the proceeding is a legislative one, as in the case of a bill of attainder, the bishops are excluded at no stage of it, though it affect the life of the party attainted. See May, Pr. Parl. 484.

[blood, which they had not before (*e*). And what makes their exclusion more reasonable is, that they have no right to be tried themselves in the court of the Lord High Steward (*f*); and therefore, surely, ought not to be judges there. For the privilege of being thus tried depends upon nobility, rather than a seat in the house; as appears from the trial of popish lords, while incapable of a seat there; of lords under age; and, (since the union] with Scotland) [of the Scots nobility, though not in the number of the sixteen representative peers: and from the trial of females; such as the queen consort or dowager, and of all peeresses by birth; and peeresses by marriage also, unless they have, when dowagers, disparaged themselves by taking a commoner to their second husband.

3. The Court of *Queen's Bench*, concerning the nature of which we partly inquired in the preceding Book (*g*), was, we may remember, divided into a *Crown* side, and a *plea* side. And on the Crown side, or Crown office, it takes cognizance of all criminal causes—from treason, down to the most trivial misdemeanor or breach of the peace. Into this court also indictments from all inferior courts may, in certain cases, be removed by writ of *certiorari* (*h*);] and the manner of trial in this court is either at bar (which rarely happens), or at *nisi prius* (*i*). [The judges of the court are the supreme coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction, (though the two former, we have mentioned, are of greater dignity,) known to the laws of England. For which reason, by the coming of the Court of Queen's Bench into any county,

(*e*) Fost. 248.

(*f*) Bro. Ab. tit. Trial, 142.

(*g*) Vide sup. vol. III. p. 392.

(*h*) As to the cases in which a *certiorari* may now be had to remove indictments from inferior courts into the Queen's Bench, see 16 & 17 Vict. c. 30, s. 6 (post, p. 453).

(*i*) See 19 & 20 Vict. c. 16, as to the trial, at the Central Criminal Court, of an indictment or inquisition removed into the Queen's Bench, in a case in which it is expedient, for the ends of justice, that an order for that purpose should be made (post, p. 453). As to trials at bar and *nisi prius* in civil cases, vide sup. vol. III. pp. 417, 582, 588.

[(as it was removed to Oxford on account of the sickness in 1665,) all former commissions of *oyer* and *terminer*, and general gaol delivery, are at once absorbed and determined *ipso facto* (*k*): in the same manner as by the old Gothic and Saxon constitutions, "*jure vetusto obtinuit, quievisse omnia inferiora judicia, dicente jus rege* (*l*).

Into this Court of Queen's Bench hath reverted all that was good and salutary of the jurisdiction of the court of *Star-chamber, camera stellata* (*m*); which was a court of

(*k*) But by the 25 Geo. 3, c. 18, it is enacted, that the session of oyer and terminer, and gaol delivery of the gaol of Newgate, for the county of Middlesex, shall not be discontinued on account of the commencement of the Term, and the sitting of the Court of Queen's Bench, at Westminster; but may be continued till the business is concluded. And the 32 Geo. 3, c. 48, was passed to continue in like manner the sessions of the peace, and of oyer and terminer, held before the justices of the peace for the county of Middlesex. (Christian's Blackstone.) And see 9 Geo. 4, c. 9, enabling the justices of the peace for the city of Westminster, also, to hold their sessions during Term and the sitting of the Court of Queen's Bench.

(*l*) Stiernh. l. 1, c. 2.

(*m*) This is said (Lamb. Arch. 154) to have been so called, either from the Saxon word ꞅꞇeoꞃan, to steer or govern, or from its punishing the *crimen stellionatus*, or cozenage; or because the room wherein it sat, the old council chamber of the palace of Westminster (Lamb. 148), was full of windows; or (to which Sir Edward Coke, 4 Inst. 66, accedes) because *haply* the roof thereof was at first garnished with gilded *stars*. As all these, (says Blackstone, vol. iv. p. 266, *in notis*,) are merely conjectures (for no stars are now in the roof, nor are any said to have remained there so late as the reign of Elizabeth), it may be allowable to propose another conjectural etymology, as plausible perhaps as any of them. It is well known that, before the banishment of the Jews under Edward the first, their contracts and obligations were denominated in our antient records *starra* or *starrs*, from a corruption of the Hebrew word *shetàr*, a covenant (Tovey's Angl. Judaic. 32; Seld. Tit. of Hon. ii. 34; Uxor. Ebraic. i. 14). These starrs, by an ordinance of Richard the first, preserved by Hoveden, were commanded to be enrolled, and deposited in chests under three keys in certain places: one, and the most considerable, of which was in the king's Exchequer at Westminster; and no starr was allowed to be valid, unless it was found in some of the said repositories (Memorand. in Scacc. P. in the sixth year of Edward the first, prefixed to Maynard's Year Book of Edward the second, fol. 8; Madox, Hist. Exch. c. 7, ss. 4, 5, 6). The room at the Exchequer where the chests containing these starrs were kept, was probably called the *starr-chamber*; and when the Jews were

[very antient original (*n*),—but new modelled by statutes 3 Henry VII. c. 1, and 21 Henry VIII. c. 20,—consisting of divers lords spiritual and temporal, being privy councillors, together with two judges of the courts of common law; without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other notorious misdemeanors, contrary to the laws of the land. Yet this was afterwards, as Lord Clarendon informs us (*o*), stretched "to the asserting of all "proclamations and orders of state; to the vindicating of "illegal commissions, and grants of monopolies; holding "for honourable that which pleased, and for just that "which profited; and becoming both a court of law to de-"termine civil rights, and a court of revenue to enrich the "treasury; the council table by proclamations enjoining to "the people that which was not enjoined by the laws, and "prohibiting that which was not prohibited; and the Star-"Chamber, which consisted of the same persons in different

expelled the kingdom, was applied to the use of the king's council, sitting in their judicial capacity. To confirm this, the first time the star-chamber is mentioned in any record, it is said to have been situated near the receipt of the Exchequer at Westminster; (the king's council, his chancellor, treasurer, justices and other sages, were assembled "*en la chambre des esteilles pres la resceipt al Westminster*"—Claus. 41 Edw. 3, m. 13). For in process of time, when the meaning of the Jewish *starrs* was forgotten, the word *star-chamber* was naturally rendered in law French *la chambre des esteilles*, and in law Latin *camera stellata*; which continued to be the style in Latin till the dissolution of that court.

It is suggested by Mr. Christian (Bl. Com. vol. iv. p. 267), in reference to the above note of Blackstone, that in one of the statutes of the University of Cambridge, the antiquity of which is not known, the word *starrum* is twice used for a schedule or inventory. The statute is entitled *De computatione procuratorum*, and it directs that "*in fine compuli fiat* STARRUM *per modum dividendæ, in quo ponentur omnia remanentia in communi cistâ, tam pignora quam pecunia, ac etiam arreraggia et debita, ita quod omnibus constare potuit evidenter, in quo statu tunc universitas fuerit, quoad bona, &c.*"—(Stat. Acad. Cant. p. 32.) Such inventories would be made at the king's Exchequer; and the room where they were deposited would probably be called the star-chamber.

(*n*) Lamb. Arch. 156.

(*o*) Hist. of Rebellion, b. 1 and 3.

[" rooms, censuring the breach and disobedience to those " proclamations by very great fines, imprisonments, and " corporal severities; so that any disrespect to any acts of " state, or to the persons of statesmen, was in no time more " penal, and the foundations of right never more in danger " to be destroyed." For which reasons it was finally abolished by statute 16 Car. I. c. 10, to the general joy of the whole nation (*p*).

4. The Court of *Chivalry* (*q*), of which we also formerly spoke (*r*) as a military court, or court of honour, when held before the Earl Marshal only,—is also a criminal court, when held before the Lord High Constable of England jointly with the Earl Marshal. And then it has jurisdiction over pleas of life and members, arising in matters of arms and deeds of war; as well out of the realm, as within it. But the criminal, as well as civil part of its authority, is fallen into entire disuse; there having been no permanent High Constable of England, (but only *pro hâc vice* at coronations and the like,) since the attainder and execution of Stafford, Duke of Buckingham, in the thirteenth year of Henry the eighth: the authority and charge, both in war and peace, being deemed too ample for a subject: so ample, that when the chief justice Fineux was asked by

(*p*) The just odium into which this tribunal had fallen before its dissolution has been the occasion that few memorials have reached us of its nature, jurisdiction and practice; except such as, on account of their enormous oppression, are recorded in the historians of the times. There are, however, to be met with some reports of its proceedings in Dyer, Croke, Coke, and other reporters of that age; and some in manuscript, of which Sir W. Blackstone possessed two: one from the fortieth year of Elizabeth, to the thirteenth of James the first; the other for the first three years of King Charles; and there is in the British Museum (Harl. MS. vol. 1, no. 1226) a very full, methodical and accurate account of the constitution and course of this court, compiled by William Hudson, of Gray's Inn, an eminent practitioner therein; and a short account of the same, with copies of all its process, may also be found in 18 Rym. Fœd. 192, &c. Hudson's Treatise of the Court of Star-chamber, is now published at the beginning of the second volume of Collectanea Juridica.

(*q*) 4 Inst. 123; Hawk. P. C. b. 2, c. 4.

(*r*) Vide sup. vol. III. p. 428.

[King Henry the eighth how far they extended, he declined answering: and said the decision of that question belonged to the law of arms, and not to the law of England (*s*).

5. The High Court of *Admiralty* (*t*), held before the lord high admiral of England, or his deputy, styled the *judge of the admiralty*,—is not only a court of civil, but also of criminal jurisdiction. This court hath cognizance of all crimes and offences committed either upon the sea, or on the coasts, out of the body or extent of any English county; and by stat. 15 Ric. II. c. 3, of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens; such as are the ports of London and Gloucester, though they lie at a great distance from the sea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exercise of a criminal jurisdiction, there, was contrary to the genius of the law of England: insomuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders might, and did frequently, escape punishment; for the rule of the civil law is, that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was always a great offence to the English nation; and therefore, in the eighth year of Henry the sixth, it was endeavoured to apply a remedy in parliament; which then miscarried for want of the royal assent. However, by the statute 28 Hen. VIII. c. 15, it was enacted, that] all treasons, felonies, robberies, murders,

(*s*) Duck. de Author. Jur. Civ.

(*t*) 4 Inst. 134, 147. As to the jurisdiction of the Court of Admiralty in general, vide sup. vol. III. p. 429; et sup. p. 18. By 20 & 21 Vict. c. 77, s. 10, the judge of this court may, on the next vacancy, be the same person as the judge of the new Court of Probate.

and confederacies on the sea, or within the jurisdiction of the admiralty, [should be tried by commissioners of oyer and terminer under the Great Seal: viz. the admiral, or his deputy, and three or four more, among whom two common law judges are usually appointed; the indictment being first found by a grand jury of twelve men, and afterwards tried by a petty jury; and that the course of proceedings should be according to the law of the land.] By 39 Geo. III. c. 37, it was afterwards declared and enacted, that all offences committed on the high seas are offences of the same nature, and liable to the same punishments, as if committed on shore; and may be tried as appointed by the 28 Hen. VIII. c. 15 (*u*): and by 46 Geo. III. c. 54 (*x*), that all offences committed within the jurisdiction of the admiralty may be determined according to the common law, in any of his majesty's islands or dominions, under the royal commission, in like manner as is provided by the statute of Henry the eighth. It is under these authorities (*y*), that offences within the jurisdiction of the admiralty are now triable; but their trial in England is also regulated by the statutes 4 & 5 Will. IV. c. 36, and 7 & 8 Vict. c. 2. By the former of these statutes (which first established the "Central Criminal Court," for offences committed in the metropolis and certain parts adjoining (*z*),) the judge of the admiralty is made, (together with

(*u*) By many modern statutes it is also provided with respect to the specific offences to which those statutes respectively relate, that when committed within the Admiralty jurisdiction they shall be dealt with, tried and determined in the same manner as other offences committed within that jurisdiction. See 7 & 8 Geo. 4, c. 29, s. 77; 7 & 8 Geo. 4, c. 30, s. 43; 9 Geo. 4, c. 31, s. 32; 11 Geo. 4 & 1 Will. 4, c. 66, s. 27; 2 Will. 4, c. 34, s. 20; 7 Will. 4 & 1 Vict. c. 85, s. 10; 7 Will. 4 & 1 Vict. c. 86, s. 10; 7 Will. 4 & 1 Vict. c. 87, s. 13; and 7 Will. 4 & 1 Vict. c. 89, s. 14.

(*x*) By 12 & 13 Vict. c. 96, persons charged in any *colony* with offences committed on the seas; may be dealt with as though the offence had been committed within the local jurisdiction of such colony. See also 18 & 19 Vict. c. 91, s. 21.

(*y*) See also 45 Geo. 3, c. 72, s. 114 et seq. At to expenses of prosecution in the Court of Admiralty, see 7 Geo. 4, c. 64, s. 27.

(*z*) As to this court, vide post, p. 380.

the lord mayor of London, the common law judges, and others,) one of the judges of the central criminal court: and it is provided (s. 22), that under any commission of oyer and terminer and gaol delivery, to be issued under the authority of that Act,—such judges, or any two or more of them, may hear and determine any offences committed or alleged to be committed on the high seas, and other places within the jurisdiction of the admiralty; and may deliver the gaol of Newgate, of any person detained therein for such offence. And by the 7 & 8 Vict. c. 2,—reciting that it is expedient that provision should be made for the trial of persons charged with offences committed at sea, or within the admiralty jurisdiction, withour issuing any special commission as required by 28 Hen. VIII. c. 15,—it is enacted, that any justices of assize, oyer and terminer, or gaol delivery, may also inquire of and determine all offences so committed; and that all indictments found, and trials and other proceedings before the said justices in such cases, shall be valid (*a*).

[These five courts may be held in any part of the kingdom; and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other. What follow are also of a general nature; but yet are of a local jurisdiction, and confined to particular districts. Of which species are,—

6, 7. The Courts of *Oyer and Terminer*, and *General Gaol Delivery* (*b*); which are held before the royal commissioners,—among whom are usually two judges of the courts at Westminster,—twice (*c*) in every county of the

(*a*) As to the form of indictment under this statute, see R. *v.* Serva, 2 C. & R. 53; R. *v.* Jones, ib. 165. As to the power of justices of the peace to issue warrants against persons charged with offences committed within the Admiralty jurisdiction, see 11 & 12 Vict. c. 42, s. 8.

(*b*) 4 Inst. 152, 168; 2 Hale, P. C. 22, 32; Hawk. P. C. b. 2, c. 5, s. 6. By 11 & 12 Vict. c. 78, these courts may reserve any question of law, for the consideration of the judges.

(*c*) Occasionally a third, or *winter* circuit, is appointed for the trial of prisoners.

kingdom;] with the exception to be presently stated, as to the metropolis and its vicinity (*d*). These courts were mentioned in the preceding Book (*e*): and we then observed, that in what is usually called *the assizes*, the judges sit by virtue of four several authorities; one of which, (that of *nisi prius*,) being principally of a civil nature, was then explained at large. The second authority, (which is the commission of the peace,) has also been treated of, when we inquired into the nature and office of a justice of the peace (*f*); and in addition to what was there stated we may remark, [that all the justices of the peace of any county, wherein the assizes are held, are bound by law to attend them,] upon due notice given by the sheriff (*g*): [or else are liable to a fine: in order to return recognizances, &c.; and to assist the judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned by way of previous examination. But the third authority, is the commission of oyer and terminer,—to hear and determine all treasons, felonies and misdemeanors] committed within the county. [This is directed to the judges and several others, or any two of them (*h*); but only the judges,] queen's counsel, barristers at law with a patent of precedence (*i*), [or serjeants at law,] named in the commission, [are of the *quorum;* so that the rest cannot act without the presence of one of them.] Under this commission, persons may be tried whether they are in gaol or at large (*k*); but the words are [to "inquire, hear, and determine:" so that by virtue of this commission, they can only proceed upon an indictment found at the same assizes; for they must first inquire, by means of the grand jury or inquest, before they are empowered to hear and

(*d*) Vide post, p. 380.

(*e*) Vide sup. vol. III. p. 417.

(*f*) Vide sup. vol. II. p. 648.

(*g*) Cro. Cir. c. 3.

(*h*) In Middlesex the commission is directed to any *four* of them. 4 Chit. Crim. Law, 145; 1 Saund. 219 (*a*).

(*i*) 13 & 14 Vict. c. 25.

(*k*) 1 Chit. Crim. Law, 144.

[determine by the help of the petit jury (*l*). Therefore they have besides, fourthly, a commission of general *gaol delivery:* which empowers them to try, and deliver every prisoner, who shall be in the gaol when the judges arrive at the circuit town (*m*); whenever or before whomsoever indicted, or for whatever crime committed (*n*). It was antiently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo* (*o*); but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead (*p*). So that, one way or other, the gaols are in general cleared, and all prisoners tried, punished, or delivered, at least twice in every year,—a constitution of singular use and excellence. Sometimes, also, upon urgent occasions, the sovereign issues a special or extraordinary commission of oyer and terminer and gaol delivery, confined to those offences which stand in need of immediate inquiry and punishment; upon which the course of proceeding is much the same, as upon general and ordinary commissions.]

What has been stated applies to courts of oyer and terminer and gaol delivery throughout the realm at large; but for the metropolis and adjacent parts, a different constitution is provided. For by 4 & 5 Will. IV. c. 36, a new court was established for trial of offences committed in London, Middlesex, and certain suburban parts of Essex, Kent, and Surrey (*q*), to be called *the Central Criminal*

(*l*) Hawk. P. C. b. 2, c. 5, s. 31.

(*m*) That is, either in actual custody, or out on bail, and so in gaol by construction of law. 1 Chit. Crim. Law, 146.

(*n*) 2 Hale, P. C. 32, 34. As to the writs of *association* and *si non omnes*, with which these several commissions are accompanied, vide sup. vol. III. p. 418.

(*o*) 2 Inst. 43.

(*p*) The forms of all the commissions, as well as of the writs of *association* and *si non omnes*, will be found in 4 Chit. Crim. Law, 129, &c.

(*q*) It has been recently enacted (by 19 & 20 Vict. c. 16), that indictments or inquisitions removed into the Queen's Bench by *certiorari*, may be ordered by that court, or by a judge thereof, in time of vacation, to be tried at the Central Criminal

Court (*r*); the judges whereof shall be the lord mayor of London; the Lord Chancellor or lord keeper; the judges of the courts at Westminster; the judges in bankruptcy; the judge of the admiralty; the dean of the Arches; the aldermen of London; the recorder and common serjeant of London; the judges of the sheriff's court there; any person who has been Lord Chancellor or lord keeper, or a judge of any of the courts at Westminster; and such others as the Crown shall from time to time appoint (*s*). And it is provided (sect. 2), that the Crown may issue its commission of oyer and terminer and gaol delivery to such court; and that the said judges, or any two or more of them, shall hold a session in the city of London or suburbs thereof, at least twelve times in every year (and oftener if need be),—such times to be fixed by General Orders of the said court; which Orders any eight or more of the judges of the courts at Westminster, are empowered from time to time to make (*t*).

8. [The Court of *General Quarter Sessions* of the

Court, wherever the crime was or is alleged to have been committed, if it shall appear expedient for the ends of justice that such order should be made; and by sect. 12, this court may issue its process for the apprehension of the party charged, and for the attendance of witnesses.

(*r*) Before the establishment of the Central Criminal Court, there existed "the court of the Sessions house in the Old Bailey," where the sessions of oyer and terminer and general gaol delivery of Newgate, for the city of London and the county of Middlesex, were holden eight times in the year. As to the jurisdiction of the Central Criminal Court, vide R. *v.* Gregory, 7 Q. B. 274; Samo *v.* The Queen, 2 Cox's Cr. C. 178; R. *v.* Hunt, ibid. 264. It may be remarked, that by 4 & 5 Will. 4, c. 36, s. 13, it was required that no indictment should be presented before the grand jury of the Central Criminal Court, unless the party prosecuting first entered into recognizances to prosecute, but this enactment was repealed by 9 & 10 Vict. c. 24, s. 2. By 19 & 20 Vict. c. 16, ss. 22, 23, the court is enabled, in cases ordered, by the Queen's Bench, to be tried there under that Act, to require either the person charged, or the prosecutor and witnesses, to enter into recognizance if it shall see fit.

(*s*) 4 & 5 Will. 4, c. 36, s. 1. Among the persons named in the text, those who usually sit to try prisoners are certain of the judges of the superior courts of law, the recorder, and the common serjeant.

(*t*) 4 & 5 Will. 4, c. 36, s. 15.

[peace (*u*), is a court that must be held, in every county, once in every quarter of a year:] which by statute 11 Geo. IV. & 1 Will. IV. c. 70, s. 35, is appointed to be in the first week after the 11th day of October; the first week after the 28th day of December; the first week after the 31st day of March; and the first week after the 24th day of June (*x*). [It is held before two or more justices of the peace (*y*); one of whom must be of the *quorum* (*z*). The jurisdiction of this court, by statute 34 Edw. III. c. 1, extends] in general [to the trying and determining of all felonies and trespasses whatsoever,] committed within their county; [but it has never been usual to try there any greater offences than small felonies (*a*); their commission providing that if any case of difficulty arises (*b*), they shall

(*u*) 4 Inst. 170; 2 Hale, P. C. 42; Hawk. P. C. b. 2, c. 8. As to the origin of this court, see Harding *v.* Pollock, 6 Bing. 30. This court is called "the general quarter sessions of the peace," when held quarterly; when held otherwise, "the general sessions of the peace." (See R. *v.* Justices of Carmarthen, 4 B. & Ald. 291.) As to the general sessions of the peace in Middlesex, see 7 & 8 Vict. c. 71, ss. 2, 3.

(*x*) By 4 & 5 Will. 4, c. 47, however, after reciting that in some counties of England and Wales the time usually fixed for holding spring assizes interferes with the due holding of the quarter sessions, in the first week after the 31st of March; and that though the justices have authority to hold general sessions of the peace at other times of the year, besides those specified in 11 Geo. 4 & 1 Will. 4, c. 70, such sessions are not *quarter sessions* within the intent of various Acts of parliament, which give jurisdiction to the justices of the peace in their quarter sessions or in their general quarter sessions, — it is enacted, that to prevent the interference of the spring assizes with the April quarter sessions, the justices of the Epiphany sessions may (if they see occasion,) name two of their body to fix some day for holding the next general quarter sessions, not earlier than 7th of March, nor later than 22nd of April.

(*y*) As to justices of the peace generally, vide sup. vol. II. p. 625.

(*z*) As to the powers of the justices, to divide into several courts of sessions of the peace for dispatch of business, see 59 Geo. 3, c. 28; 7 Will. 4 & 1 Vict. c. 19, s. 4; 5 & 6 Vict. c. 38, s 4; 14 & 15 Vict. c. 55, s. 15. See also 1 & 2 Vict. c. 4, to remove doubts as to the legality of summoning juries for the trial of prisoners at *adjourned* quarter sessions.

(*a*) As to offences committed within a *borough* in the county, vide post, p. 385.

(*b*) By 11 & 12 Vict. c. 78, this court may reserve any question of law for the consideration of the judges.

[not proceed to judgment, but in the presence of one of the justices of the courts of Queen's Bench or Common Pleas, or of one of the judges of assize: and therefore murders, and other capital felonies, have been usually remitted for a more solemn trial at the assizes.] And now it is expressly provided, by statute, that neither the justices of any county,—nor the recorder of any borough,—shall, at any general or quarter sessions, try any prisoner for treason, murder, or capital felony (*c*); or for any felony, which when committed by a person not previously convicted of felony, is punishable with penal servitude for life (*d*); nor for any of the particular offences enumerated in 5 & 6 Vict. c. 38 (*e*). [They cannot also try any newly-created offence, without express power given them by the statute which creates it (*f*). But there are many offences and particular matters, which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this court,—as the smaller misdemeanors] and felonies; [and especially offences relating to the game, highways, ale houses, bastard children, the settlement and provision for

(*c*) 5 & 6 Vict. c. 38.

(*d*) 5 & 6 Vict. c. 38; 20 & 21 Vict. c. 3.

(*e*) These are,—1. Misprision of treason. 2. Offences against the queen's title, prerogative, or government, or against either house of parliament. 3. Offences subject to the penalties of *præmunire*. 4. Blasphemy and offences against religion. 5. Administering or taking unlawful oaths. 6. Perjury and subornation of perjury. 7. Making or suborning false oaths, &c., punishable as perjuries or misdemeanors. 8. Forgery. 9. Maliciously firing corn, grain, &c., wood, trees, &c., or heath, gorse, &c. 10. Bigamy, and offences against the laws relating to marriage. 11. Abduction of women and girls. 12. Concealing births. 13 Offences against the bankrupt and insolvent laws. 14. Seditious, blasphemous, or defamatory libels. 15. Bribery. 16. Unlawfulcombinations and conspiracies, with certain exceptions. 17. Stealing, &c., records, &c. 18. Stealing &c., bills, &c., and written documents relating to real estate.

Also, by 4 & 5 Vict. c. 56, and 9 & 10 Vict. c. 25, justices are restrained from trying at sessions, any offences under those Acts, respectively; and by 20 & 21 Vict. c. 54, from trying any of the misdemeanors against that Act.

(*f*) R. *v.* Buggs, 4 Mod. 379; Salk. 406.

[the poor, servants' wages, and apprentices (*g*). Some of these are proceeded upon by indictment, and others in a summary way by motion and order thereupon; which] indictments may,—but only where it is against a body corporate not authorized to appear by attorney in the court in which the indictment is preferred, or where a fair and impartial trial cannot be had in the court below, or where a question of law of more than usual difficulty and importance is likely to arise upon the trial, or a view of premises, or a special jury may be required for the satisfactory trial of the case (*h*),—[be removed into the court of Queen's Bench by writ of *certiorari facias* (*i*); and be there either quashed or confirmed (*k*). The records or rolls of the sessions, are committed to the custody of a special officer, denominated the *custos rotulorum*; who is always a justice of the quorum (*l*), and, "among them of the quorum," saith Lambard (*m*), "a man for the most part especially "picked out either for wisdom, countenance or credit." The nomination of the *custos rotulorum* is by the royal sign manual; and to him the nomination of the *clerk of the peace* belongs (*n*),] an officer who acts as clerk to the court of quarter sessions, and records all their proceedings.

(*g*) See Lamb. Eirenarcha, and Burn's Justice.

(*h*) 16 & 17 Vict. c. 30, s. 4; et vide post, p. 453.

(*i*) Hawk. P. C. b. 2, c. 27, ss. 22, 23.

(*k*) See R. *v.* Joseph, 1 W. W. & H. 419; R. *v.* Joule, 5 A. & E. 539; R. *v.* Higgins, ibid. 554. As to the removal of the orders of quarter sessions into the Queen's Bench, to be enforced there, 12 & 13 Vict. c. 45, s. 18. (Hawker *v.* Field, 1 L. M. & P. 606.) As to the procedure on appeals to the quarter sessions from the determination of justices, see 12 & 13 Vict. c. 45.

(*l*) As to the *quorum*, vide sup. vol. II. p. 651.

(*m*) B. 4, c. 3.

(*n*) 37 Hen. 8, c. 1; 1 W. & M. st. 1, c. 21; Harding *v.* Pollock, 6 Bing. 25. This appointment must not be sold by the *custos rotulorum*, see same statutes. As to the suspension or dismissal of the clerk of the peace, see 1 W. & M. st. 1, c. 21, s. 6. He is to take the custody of such documents as are directed to be deposited with him under the standing orders of either house of parliament. 7 Will. 4 & 1 Vict. c. 83; R. *v.* Payn, 6 A. & E. 392. As to the remuneration of this officer, which used to be by fees, but may now, at the discretion of the justices, be by salary, see 14 & 15 Vict. c. 55, s. 9; and see also 18 & 19 Vict. c. 126, s. 18.

As regards the county of Middlesex in particular,—it has lately been enacted, by 7 & 8 Vict. c. 71, that there shall be holden for that county two sessions, or adjourned sessions, of the peace in every calendar month; and that the first sessions in January, April, July, and October, respectively, shall be the general quarter sessions of the county; and that the second sessions in January, April, July, and October, shall be adjournments of the general quarter sessions: and that it shall be lawful for her majesty to appoint a person, —being a serjeant, or a barrister at law of not less than ten years' standing, and in the commission of the peace for the county, and qualified by law to act as justice of the peace,—to be the Assistant Judge of the said court of sessions of the peace; who shall preside at the hearing of all appeals, on the trials of all felonies and misdemeanors, and all matters connected therewith, and hold his office during good behaviour (*o*).

In many municipal corporations or boroughs, there is also a court of quarter sessions of the peace (*p*); having, in general, the same authority in cases arising within the limits of the borough, as the county quarter sessions within the county (*q*). But of such court, the recorder of the borough

(*o*) In cases of sickness or unavoidable absence, or such occasion as shall be allowed by a secretary of state, the assistant judge may appoint from time to time a deputy, qualified to be appointed assistant judge. (7 & 8 Vict. c. 71, s. 8.) By 14 & 15 Vict. c. 55, s. 14, the qualification for a deputy, is ten years' standing at the bar; but he need not be in the commission of the peace, as was formerly required.

(*p*) Vide 5 & 6 Will. 4, c. 76, s. 103; 6 & 7 Will. 4, c. 105; 7 Will. 4 & 1 Vict. c. 19; supra, vol. III. p. 147.

(*q*) 5 & 6 Will. 4, c. 76, s. 105. There are however the following exceptions to be noticed, viz.,—that no recorder has, by virtue of his office, power to make or levy any county rate, or rate in the nature of a county rate; nor to grant any licence or authority to keep an inn, alehouse, or victualling house, or to sell exciseable liquors by retail; nor to exercise any of the powers by 5 & 6 Will. 4, c. 76, specially vested in the council of the borough. By sect. 111 of the same Act, where a borough has *no* separate quarter sessions of the peace, the justices of the peace for the county at large are to exercise the jurisdiction of justices of the peace for such borough, as fully as they do for the

is, by 5 & 6 Will. IV. c. 73, s. 105, to be the sole judge: and he is thereby directed to hold such court once in every quarter of a year; or at such other and more frequent times as in his discretion he may think fit, or her majesty may direct (*r*).

9. [The *Sheriff's Tourn* (*s*), (or rotation,) is a court of record, held twice every year, within a month after Easter and Michaelmas, before the sheriff in different parts of the county: being indeed only the *turn* of the sheriff to keep a court leet, in each respective hundred (*t*): this therefore is the great court leet of the county, as the county court is the court baron: for out of this, for the ease of the sheriff, was taken,—

10. The *Court Leet, (or View of Frank Pledge)* (*u*); which is a court of record, held once in the year and not oftener (*x*), within a particular hundred, lordship, or manor, before the steward of the leet: being the king's court granted by charter to the lords of those hundreds or manors. Its original intent was to view the frank pledges, that is, the freemen within the liberty: who, we may remember (*y*), according to the institution of the great Alfred, were all mutually pledges for the good behaviour of each other. Besides this, the preservation of the peace, and the chastisement of divers minute offences against the public good, are the objects both of the court leet, and of the sheriff's tourn: which have exactly the same jurisdiction, one being only a larger species of the other: extending over more

county at large. But where a separate court of quarter sessions is granted, then if the borough were previously exempt from the jurisdiction of the county justices, by virtue of a *non-intromittant* clause in their charter (as to which see R. *v.* Sainsbury, 4 T. R. 451), it shall still remain so; otherwise the county justices will have concurrent jurisdiction in the borough with the borough justices. (2 Arch. Just. 26.)

(*r*) The recorder may appoint a *deputy*, in case of sickness or unavoidable absence, to hold the quarter sessions then next ensuing. (6 & 7 Vict. c. 89, s. 7.)

(*s*) 4 Inst. 259; 2 Hale, P. C. 69; Hawk. P. C. b. 2, c. 10.

(*t*) Mirr. c. 1, ss. 13, 16.

(*u*) 4 Inst. 261; Hawk. P. C. b. 2, c. 11.

(*x*) Mirr. c. 1, s. 10.

(*y*) Vide supra, vol. I. p. 123.

[territory, but not over more causes. All freeholders within the precinct are obliged to attend them, and all persons commorant therein: which commorancy consists in usually lying there: a regulation which owes its original to the laws of king Canute (*z*). But persons under twelve, and above sixty years old; peers; clergymen; women; and the king's tenants in antient demesne,—are excused from attendance there: all others being bound to appear upon the jury, if required and make their due presentments. It was also antiently the custom to summon all the king's subjects, as they respectively grew to years of discretion and strength, to come to the court leet, and there take the oath of allegiance to the king. The other general business of the leet and tourn, was to present by jury all crimes whatsoever that happened within their jurisdiction: and not only to present, but also to punish, all trivial misdemeanors; as all trivial debts were recoverable in the court baron and county court: justice, in these minuter matters of both kinds, being brought home to the doors of every man by our antient constitution. Thus in the Gothic constitution, the *hæreda*, which answered to our court leet, "*de omnibus quidem cognoscit, non tamen de omnibus judicat* (*a*)." The objects of their jurisdiction, are therefore unavoidably very numerous; being such as in some degree, either less or more, affect the public weal, or good government of the district in which they arise; from common nuisances and other material offences against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet, have been for a long time in a declining way (*b*):] and latterly have fallen into almost total desuetude: [a circumstance owing, in part, to the discharge granted by the statute of Marlbridge, (32 Hen. III. c. 10,) to all prelates, peers, and clergymen, from their attendance upon these courts; which occasioned them to grow into disrepute. And hence it is,

(*z*) Part 2, c. 19.

(*a*) Stiern. de Jur. Goth. l. 1, c. 2.

(*b*) See Colebrook *v.* Elliott, 3 Burr. 1864.

[that their business hath, for the most part, gradually devolved upon the quarter sessions; which it is particularly directed to do in some cases by stat. 1 Edw. IV. c. 2. It has also, in some instances, devolved upon the justices out of sessions.

11. The Court of the *Coroner* (c) is also a court of record, to inquire when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled,] in general, [to do *super visum corporis*. Of the coroner and his office, we treated at large in a former volume, among the public officers of the kingdom (d), and therefore shall not here repeat our inquiries; only mentioning his court, by way of regularity, among the criminal courts of the nation.

12. The Court of the *Clerk of the Market* (e), is incident to every fair and market in the kingdom, to punish misdemeanors therein; as a court of *pied poudre* (f) is to determine all disputes relating to private or civil property. The object of this jurisdiction, is principally the recognizance of weights and measures (g); to try whether they be according to the true standard thereof or no; which standard was antiently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly: and hence this officer, though usually a layman, is called the *clerk* of the market (h). If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burnt. This is the most inferior court of criminal jurisdiction in the kingdom:] and its functions, as regards weights and measures, seem in a great measure to be now superseded by the provisions of

(c) 4 Inst. 271; 2 Hale, P. C. 53; Hawk. P. C. b. 2, c. 9.

(d) Vide sup. vol. II. p. 640.

(e) 4 Inst. 273.

(f) Vide supra, vol. III. p. 442, n. (t).

(g) See stat. 17 Car. 2, c. 19. As to weights and measures, vide supra, vol. II. p. 529.

(h) Bac. of English Government, b. 10, c. 8.

5 & 6 Will. IV. c. 63; which enact, that Inspectors or examiners of weights and measures shall be appointed, who shall attend with the stamps and copies of the imperial standard weights in their custody, at each of the several market towns; and examine and stamp, (if found correct,) such weights and measures as shall be brought to them for that purpose; and give, if required, a certificate of such stamping: and that it shall be lawful for any magistrate, or authorized Inspector, to enter at all reasonable times any shop or other place where goods are exposed for sale, in order to examine the weights and measures; and then if found incorrect, such weights and measures shall be liable to be seized and forfeited; and that the person in whose possession the same shall be found, or who shall obstruct such examination, shall be liable to a penalty of *5l.* (*i*)

II. As to courts of a private or special jurisdiction.

[There are a few other criminal courts, of greater dignity than many of] those already noticed; [but of a more confined and partial jurisdiction (*j*): extending only to some particular places, which the royal favour, confirmed by Act of parliament, has distinguished by the privilege of having peculiar courts of their own, for the punishment of crimes and misdemeanors arising within the bounds of their cognizance. These, not being universally dispersed, or of general use, as the former, but confined to one spot, as well as to a determinate species of causes,—may be denominated private or special courts of criminal jurisdiction.] Thus—

1. [The Court of the *Lord Steward* of the king's *Household*, or, in his absence, of the treasurer, comptroller, and steward of the *marshalsea* (*k*), was created by statute 33 Hen. VIII.

(*i*) See Hutchins *v.* Reeves, 9 Mee. & W. 747.

(*j*) Vide sup. p. 363.

(*k*) There was also formerly the court of the *lord steward, treasurer,* or *comptroller* of the king's household; which was instituted by 3 Hen. 7, c. 14, to inquire of felony by any of the king's sworn servants in the cheque roll of the household, under the degree of a lord, by the inquisition of a jury of twelve "sad men," that is, sober and discreet persons. This court is abolished; the statute of 3 Hen. 7, c. 14, being repealed by 9 Geo. 4, c. 31.

[c. 12, with a jurisdiction to inquire of, hear, and determine all treasons, misprisions of treason, murders, manslaughters, bloodshed, and other malicious strikings; whereby blood shall be shed in or within the limits (that is, within two hundred feet of the gate) of any of the palaces or houses of the king, or any other house where the royal person shall abide. The proceedings are also by jury, both a grand and petit one, as at common law; taken out of the officers and sworn servants of the king's household. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand,—which is part of the punishment for shedding blood in the king's court,—are very minutely set forth in the said statute 33 Hen. VIII., and the several offices of the servants of the household in and about such execution are described: from the serjeant of the wood-yard, who furnishes the chopping block, to the serjeant farrier, who brings hot irons to sear the stump.] But so much of this Act "as relates to the "punishment of manslaughter and malicious striking, by "reason whereof blood shall be shed," is now repealed by 9 Geo. IV. c. 31; and the jurisdiction of the court itself has long since fallen into disuse.

2. [As in the preceding Book (*l*), we mentioned the courts of the two universities, for the redress of civil injuries: it will be proper to add a short word concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford (*m*) hath authority to determine all criminal offences or misdemeanors,] committed by a member of the university, [under the degree of treason, felony, and mayhem;] and treason, felony, and mayhem, committed by any member, may also be tried in the Court of the Lord High Steward of the university.

(*l*) Vide sup. vol. III. p. 440.

(*m*) Blackstone treats only of the criminal jurisdiction of the University of Oxford. A similar jurisdiction is, however, enjoyed by that of Cambridge. (Bac. Ab. tit. "Universities.") By 19 & 20 Vict. c. 17, s. 18, the jurisdiction of the University of Cambridge in criminal as well as other proceedings, wherein any person *not* a member of the university shall be a party, is taken away.

[For by the charter of the 7th June, in the second year of Henry the fourth, (confirmed, among the rest, by the statute 13 Eliz. c. 29,) conusance is granted to the university of Oxford of all indictments of treasons, insurrections, felonies, and mayhem, which shall be found in any of the royal courts against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy; who is to be nominated by the chancellor of the university for the time being. But, when his office is called forth into action, such high steward must be approved by the lord high chancellor of England: and a special commission, under the Great Seal, is given to him and others, to try the indictment then depending, according to the law of the land, and the privileges of the said university. When, therefore, any indictment is found at the assizes or elsewhere, against any scholar of the university or other privileged person, the vice-chancellor may claim the conusance of it (*n*): and, (when claimed in due time and manner,) it ought to be allowed him by the judges of assize; and then it comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the conusance claimed; for it is apprehended that the high steward cannot proceed originally *ad inquirendum:* but only, after inquest in the common law courts, *ad audiendum et determinandum.* Much in the same way, as when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assizes or in the Court of Queen's Bench; and then, in consequence of a writ of *certiorari*, transmitted to be finally heard and determined, before his grace the lord high steward and the peers (*o*).

When the conusance is so allowed,—if the offence be *inter minora crimina*, or a misdemeanor only,—it is tried in

(*n*) See R. *v.* Agar, 5 Burr. 2820; Kendrick *v.* Kynaston, 1 Bla. Rep. 454; Hayes *v.* Long, 2 Wils. 310; Leasingby *v.* Smith, ibid. 406; R. *v.* Routledge, 2 Doug. 531; R. *v.* Grundon, Cowp. 319; Thornton *v.* Ford, 15 Exch. 634.

(*o*) See 19 & 20 Vict. c. 16, s. 29.

[the chancellor's court, by the ordinary judge. But if it be for treason, felony, or mayhem, it is then, and then only, to be determined before the high steward, under the king's special commission to try the same. The process of the trial is this: The high steward issues one precept to the sheriff of the county, who thereupon returns a panel of eighteen freeholders, and another precept to the bedells of the university; who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio universitatis gaudentes;*" and by a jury formed *de medietate,*—half of freeholders and half of matriculated persons,—is the indictment to be tried; and that in the Guildhall of the city of Oxford. And if execution be necessary to be awarded, in consequence of finding the party guilty, the sheriff of the county must execute the university process: to which he is annually bound by an oath.]

These proceedings have been described with some minuteness, on account of the importance of the privilege; but in modern times the occasions for reducing them into practice have been happily very rare; [nor will it perhaps ever be thought advisable to revive them, though it is not a right that rests merely *in scriptis* or theory, but has formerly been carried into execution. There are many instances,—one in the reign of Queen Elizabeth, two in that of James the first, and two in that of Charles the first,—where indictments for murder have been challenged by the vice-chancellor at the assizes, and afterwards tried before the high steward, by jury. The commissions under the Great Seal, the sheriff's and bedells' panels, and all the other proceedings on the trial of the several indictments,—are still extant in the archives of the university.]

CHAPTER XV.

OF SUMMARY CONVICTIONS.



[We are next, according to the plan laid down (*a*), to take into consideration the proceedings in the courts of criminal jurisdiction, in order to the punishment of offences.] These also, as well as the offences themselves, have become, in a great variety of instances, the subject of legislative provisions; so that our disquisitions in this latter portion of the work, as well as in the former, will be founded partly on the principles of the common law, and partly on parliamentary enactment. [These proceedings are divisible into two kinds, *summary* and *regular:* the former of which shall be briefly explained, before we enter on the latter, which will require a more thorough and particular examination.

By a *summary* proceeding, is meant principally such as is directed by several Acts of parliament, (for the common law is a stranger to it, unless in the case of contempts,) for the conviction of offenders, and the infliction of certain penalties created by those Acts. In these, there is no intervention of a jury; but the party accused is acquitted or condemned, by the suffrage of such person only as the statute has appointed for his judge: an institution designed professedly for the greater ease of the subject; by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offence.

(*a*) Vide supra, p. 363.

[I. Of this summary nature, are all trials of offences and frauds contrary to the laws of the *excise* (*b*): which are to be inquired into and determined either by the *commissioners of excise*, or by justices of the peace (*c*); officers who are all of them appointed, and removable, at the discretion of the Crown.]

II. Another branch of summary proceedings, is that before *justices of the peace* (*d*), in respect of a variety of minor offences; viz. such as, (for the most part,) amount not to felony or misdemeanor, and are prohibited only under pecuniary penalties (*e*). Some of these were formerly punishable at the court leet, while that court was in use; but the greater part have been both created, and placed under the summary jurisdiction of the justices of the peace, by the provisions of modern Acts of Parliament. That jurisdiction indeed has, in certain cases, been recently extended even to felony: for by 10 & 11 Vict. c. 82, and 13 & 14 Vict. c. 37, it has been provided, in the case of *juvenile offenders*, that any person charged with having committed, or attempted to commit, (or with having been an aider, abettor, counsellor, or procurer in the commission of,) any offence, then or thereafter to be by law deemed, or declared to be, simple larceny, or punishable as simple larceny,—and whose age shall not appear to exceed sixteen years (*f*),—may, on conviction before two justices, in open court at petty sessions be imprisoned for three months, with or without hard labour, (to which whipping may be added,

(*b*) As to the excise, vide sup. vol. II. p. 573, et seq. The mode of proceeding for offences against the *customs*, (some of which are punishable before justices,) is pointed out by 16 & 17 Vict. c. 107, s. 269, et seq.

(*c*) See 4 & 5 Vict. c. 20, s. 26, et seq.; 15 & 16 Vict. c. 61.

(*d*) As to the justices of the peace, vide sup. vol. II. p. 648.

(*e*) Vide sup. p. 79.

(*f*) By 3 & 4 Vict. c. 90, the Court of Chancery is empowered to assign the care of an infant convicted of felony to any person willing to undertake the charge; but nothing in the Act contained is to interfere with the execution of the sentence. As to *reformatory schools*, vide sup. vol. III. p. 214.

if the offender be a male and not exceeding the age of fourteen years); provided always, that if such justices on the hearing of the case, shall deem the offence not to be proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged, with or without requiring sureties for his future good behaviour, and furnish him with a certificate stating such dismissal; on obtaining which certificate, or on having been convicted under these Acts, he shall be discharged from all further or other proceedings for the same cause. But if the justices shall be of opinion that the charge is, from any circumstance, a fit subject for prosecution by indictment (*g*), or if the person charged, or his parents, shall object, when interrogated on the subject, to the case being summarily disposed of under the provisions of these Acts, the justices shall proceed with the charge as in other cases of felony. And now by 18 & 19 Vict. c. 126, this summary jurisdiction is extended; and it is no longer exclusively confined to the case of juvenile offenders. For it is enacted, that where any person is charged at petty sessions, with simple larceny (the value of the property stolen, in the opinion of the justices, not exceeding five shillings), or is charged with having *attempted* to commit larceny from the person or simple larceny;—the justices may hear and determine the charge in a summary way; and, (if the person charged shall confess the same, or the justices after hearing the whole case for the prosecution and for the defence shall find the charge to be proved,) may convict and commit to prison, with or without hard labour, for any period not exceeding three calendar months: or, (if they find the charge not proved,) shall dismiss the charge and deliver

(*g*) Where any person having been *twice* convicted of any of the offences punishable, upon summary conviction, under the provisions contained in 7 & 8 Geo. 4, c. 30, 10 & 11 Vict. c. 82, or 11 & 12 Vict. c. 59,—shall afterwards be indicted for and convicted of simple larceny, or any offence punishable under those Acts like simple larceny, he may be sentenced to penal servitude for not more than seven or less than three years, or be otherwise punishable as provided by 7 & 8 Geo. 4, c. 29. (12 & 13 Vict. c. 11, s. 3; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.)

a certificate of dismissal, as in the case just mentioned of juvenile offenders. There is, however, a proviso, that if the person charged do not consent to have the case heard and determined by the parties; or if it shall appear that the offence is one which, owing to the previous conviction of the party charged, is punishable with penal servitude (*g*); or that the charge from any other circumstances should be proceeded on by way of indictment, rather than to be disposed of summarily;—the justices shall deal with the case as if the Act had not passed. They are also authorized, as under the Juvenile Offenders' Acts, to dismiss the persons charged without proceeding to a conviction, if, on the hearing, there appear to be circumstances in the case which render it inexpedient to inflict any punishment.

This Act also contains a provision that where *any* person is charged at petty sessions with simple larceny, (the property alleged to have been stolen exceeding in value five shillings); or with stealing from the person, or with larceny as a clerk or servant; and the evidence adduced by the prosecutor is, in the opinion of the justices, sufficient to put the person charged on his trial, and the case appear to be one properly to be disposed of in a summary way and adequately punished under this Act,—such person may be asked, (after the charge has been reduced to writing,) whether he is guilty or not thereof: and if he shall say that he is guilty, the justices may enter such plea on the proceedings; and commit him to prison, with or without hard labour, for any term not exceeding six calendar months.

As to *assaults* or *batteries*, also, the legislature has established a summary method of proceeding before justices, independently of the remedy by indictment applicable generally to these and to all other offences, whether amounting to felony or misdemeanor. For by 9 Geo. IV. c. 31, s. 27, persons committing any assault or battery, not accompanied by the attempt to commit felony, may on complaint of the party aggrieved (*h*), be brought before

(*g*) Vide sup. p. 395 n. (*g*).

(*h*) R. *v.* Deny, 2 L. M. & P. 230.

two justices of the peace, by whom such offence may be heard and determined (unless, from the nature of the case they shall think fit rather to direct an *indictment* to be preferred (*i*)); and the offender, upon conviction, shall pay such fine as to the justices shall appear meet, not exceeding (together with costs if ordered) the sum of 5*l.*; which fine shall be paid over to the parish officers, to the use of the general rate of the county (*j*). And it is enacted, that if any person shall pay the whole amount so adjudged to be paid upon conviction, or shall suffer imprisonment for a term not exceeding two calendar months, as authorized by the Act in case of non-payment, or shall obtain the certificate of the justices dismissing the complaint, he shall in every such case be released from all further proceedings, civil or criminal, for the same cause (*k*). The Act, however, contains a proviso to prevent the justices from determining any case in which a question shall arise as to the title to lands, tenements or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice (*l*). And it is now also provided by 16 & 17 Vict. c. 30, s. 1 (*m*),—with respect to assaults upon any females whatever, or upon any male child whose age shall not seem to the justices to exceed fourteen years, of such an aggravated nature as not to be sufficiently punished under the 9 Geo. IV. c. 31,—that the justices may cause the offender on conviction to be imprisoned, with or without hard labour, for a period not exceeding six calendar months, or to pay a fine not exceeding 20*l.*, and to be imprisoned for that period in default of pay-

(*i*) The costs of prosecutors and witnesses, or any prosecution so directed, may be allowed at the discretion of the court. (14 & 15 Vict. c. 55, s. 3.)

(*j*) As to the power of the justices to commit in default of immediate payment, see Arnold *v.* Dimsdale, 2 Ell. & Bl. 580.

(*k*) As to this certificate and its effects, see Tunnicliffe *v.* Todd, 5 C. B. 553; Chaddock *v.* Wilbraham, ibid. 642.

(*l*) 9 Geo. 4, c. 31, s. 29.

(*m*) There is no appeal to the quarter sessions from a conviction under this provision. (16 & 17 Vict. c. 30, s. 1.)

ment; and they are also enabled to bind over such offender to keep the peace and be of good behaviour for a further period of six months after the expiration of the imprisonment.

The course of proceeding upon summary convictions, in general, has been recently regulated by the statute 11 & 12 Vict. c. 43 (*n*); which consolidates and amends the previous provisions on the subject (*o*). It may be shortly stated as follows:—

Where a written *information* has been laid before any justice of the peace, for any county or place in England or Wales, of any offence committed within his jurisdiction, and punishable on summary conviction before one or more justices; or where any *complaint*, whether written or verbal, has been made before any justice of the peace of any county or place in England or Wales, in or within his jurisdiction, on which one or more justices have authority by law to make an order for the payment of money or otherwise;—such justice is to issue his *summons* to the party charged, requiring him to appear and answer (*p*): and, if the summons be disobeyed, may issue a *warrant* to apprehend him, and bring him before the court: or, if the justice think fit, he may,—in the case of an information,

(*n*) The statute 11 & 12 Vict. c. 43, is not to alter or affect any of the provisions in the Metropolitan Police Acts, 10 Geo. 4, c. 44; 2 & 3 Vict. cc. 47, 71; 3 & 4 Vict. c. 84; 19 & 20 Vict. c. 2; 20 & 21 Vict. c. 64; or of the London Police Act, 2 & 3 Vict. c. xciv (and see 18 & 19 Vict. c. 120, s. 227); nor does it extend to proceedings under the excise or customs, &c., or as to paupers or lunatics, or under the Factory Acts. (11 & 12 Vict. c. 43, s. 33.)

(*o*) In the time of Blackstone the course of proceeding before magistrates had begun to take a regular shape, but seems to have been attended at a prior period with little ceremony. For he says, (vol. iv. p. 283,) "The summons is now held to be an indispensable requisite, though the justices long struggled the point, forgetting that rule of natural reason expressed by Seneca,

'*Qui statuit aliquid, parte inauditâ alterâ,*
Æquum licet statuerit, haud æquus fuit.'"

(*p*) 11 & 12 Vict. c. 43, s. 1, and see sect. 29. The form of the summons and of the other instruments under this Act, is given in a schedule thereto.

and provided it be supported by the oath of the prosecutor (*q*),—cause a warrant instead of a summons to be issued in the first instance (*r*). By the general rule, however, and subject to exception in any particular case where a different limitation as to time is provided by Act of Parliament, every such information or complaint must be laid or made within six calendar months from the time when the matter arose (*s*).

A summons may also be issued by the justice to compel the attendance of witnesses for the prosecutor, complainant, or defendant, as the case may be; and if the summons be disobeyed, the justice may issue his warrant for the same purpose; or, if satisfied by evidence upon oath that the witness will not attend, may issue the warrant in the first instance (*t*).

The hearing is to take place before one justice, or two or more, as may be directed in the Act of Parliament relating to the particular offence; or, where there is no direction, then before any one justice of the county or place where the matter has arisen; and the room where it takes place is to be deemed an open and public court, to which all are to have access; and the prosecutor or complainant is to be allowed to conduct his case, and to examine and cross-examine the witnesses, by his counsel or attorney; and the like privilege is allowed to the defendant (*u*).

The hearing commences by stating to the defendant the substance of the information or complaint; and he may show cause, if he can, why he should not be convicted or an order made (*v*): but if he do not admit the truth of

(*q*) In proceedings before magistrates, (as well as in other cases,) an affirmation, in lieu of oath, will suffice in the case of Quakers, Moravians or Separatists. As to this affirmation, vide sup. vol. II. pp. 627, 628.

(*r*) 11 & 12 Vict. c. 43, ss. 2, 3, &c.

(*s*) Sect. 11.

(*t*) Sect. 7.

(*u*) Sect. 12. See 18 & 19 Vict. c. 126, s. 4.

(*v*) By 11 & 12 Vict. c. 43, s. 9, a *variance* between the information and the evidence adduced in support thereof, when not such as to have misled the party charged, is in general immaterial; when otherwise, it will be ground for an adjournment.

what is charged, the court is to proceed to hear the prosecutor or complainant, or his witnesses; and afterwards the defendant and his witnesses; and also to hear such witnesses as the prosecutor or complainant may examine in reply, if the defendant shall have given any evidence except as to his general character: but the former shall not be entitled to make any observations upon the evidence given by the latter, nor the latter to make any observations upon the evidence given by the former in reply; and when the evidence, (all which is to be upon oath,) shall be closed, the court shall proceed to convict, or make an order on, the defendant, or dismiss the information or complaint, as the case may be;—every conviction or order being drawn up in proper form, and lodged with the clerk of the peace, to be filed among the records of the quarter sessions (*x*); and a certificate of every order of dismissal; being also drawn up and given to the defendant (*y*).

It is also competent to the court, in any case, to award costs, either against the defendant or the prosecutor or complainant, as the case may be; and for the amount of such costs, or of any pecuniary penalty or sum of money adjudged by a conviction or order, to issue a warrant of distress on the goods and chattels of the party; or in default of distress (*z*), or where the statute simply directs imprisonment, a warrant of commitment to prison (*a*): but if satisfied that a warrant of distress would be ruinous to the defendant,—or that he has no goods,—the court is authorized to issue a warrant of commitment in any case, in lieu of a warrant of distress (*b*).

Power is also granted to the court, from time to time, to adjourn the proceedings as circumstances may require; and in the mean time to allow the defendant to go at large; or commit him to prison: or discharge him on entering into a recognizance, (either with or without sureties,) con-

(*x*) See 18 & 19 Vict. c. 126, s. 7.

(*y*) 11 & 12 Vict. c. 43, s. 14. See 18 & 19 Vict. c. 126, ss. 1, 7.

(*z*) 11 & 12 Vict. c. 43, ss. 18, 22.

(*a*) Sects. 20, 24.

(*b*) Sect. 19.

ditioned for his re-appearance at the adjournment day; which recognizance, if broken, is to be transmitted to the clerk of the peace to be proceeded upon (*c*).

This is, in general, the method of summary proceedings before a justice or justices of the peace; though the particular statute which creates the offence, and authorizes its punishment before such justice or justices, sometimes also specially points out the method in which offenders are to be convicted (*d*). It is to be remarked, however, that unless there be some statute directing a prosecution before a justice or justices of the peace, no offence is capable of being so dealt with; but the offender must be proceeded against either by indictment or information. It also deserves notice, that a summary conviction is not generally speaking conclusive; but is subject to *appeal*. For in the greater number of the statutes which authorize this course of proceeding in particular instances, an appeal to the quarter sessions is also authorized. And in such cases, and if a legal question be involved, the decision of the quarter sessions may, in its turn, be brought under the review of the Court of Queen's Bench (*e*). And now, by 20 & 21 Vict. c. 43, it is provided, with respect to any information or complaint summarily determined before a justice or justices, that any point of law arising thereon may be brought immediately before any of the superior courts of law in the form of a case for the opinion of such court, —the appellant first entering into a recognizance to submit himself to the original determination, unless it be reversed. It is however provided, that any person, who shall appeal under these provisions, shall be taken to have abandoned any appeal to the quarter sessions, to which he would otherwise be entitled by law (*f*).

(*c*) Sects. 16, 29.

(*d*) See 7 & 8 Geo. 4, c. 29, s. 62; c. 30, s. 20; 5 & 6 Will. 4, c. 76, s. 127; and 2 & 3 Vict. c. 71.

(*e*) See Dickinson, Q. S., 6th ed. p. 658.

(*f*) 20 & 21 Vict. c. 43, s. 14. As to the practice on such appeals, see Reg. Gen. M. T. 1857.

III. [To this head of summary proceedings may also be properly referred the method immemorially used by the superior courts of justice, of punishing contempts by *attachment*, and the subsequent proceedings thereupon.

The contempts which are thus punished, are either *direct;* which openly insult or resist the powers of the courts, or the persons of the judges who preside there: or else are *consequential;* which, (without such gross insolence, or direct opposition,) plainly tend to create an universal disregard of their authority. The principal instances of either sort that have been usually punished by attachment, are of the following kinds (*g*): 1. Those committed by inferior judges and magistrates; by acting unjustly, oppressively, or irregularly, in administering those portions of justice which are intrusted to their distribution; or by disobeying the royal writs issued out of the superior courts, by proceeding in a cause after it is put a stop to, or removed, by writ of prohibition, certiorari, error, supersedeas, and the like. For as the superior courts, (and especially the Court of Queen's Bench,) have a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court: by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty. 3. Those committed by attornies and solicitors, (who are also officers of the respective courts,) by gross instances of fraud and corruption, injustice to their clients, or other dishonest practices. For the malpractice of the officers, reflects some dishonour on their employers; and, if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen in collateral matters relating to the discharge of their office: such as making default

(*g*) Hawk. P. C. b. 2, c. 22.

[when summoned: refusing to be sworn, or to give any verdict; eating or drinking without the leave of the court, and especially at the cost of either party; and other misbehaviour or irregularities of a similar kind:—but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict (*h*). 5. Those committed by witnesses: by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by parties to any suit or proceeding before the court: by disobedience to any rule or order made in the progress of a cause; as by non-payment of costs awarded by the court upon a motion; or by non-observance of an award duly made] a rule of the court (*i*). However, the contempt in such cases as last mentioned, is in general consequential or constructive only; as it implies no actual disregard of authority, but may proceed from the poverty of the party. 7. Those committed by any persons (*k*): in the way of disobedience to the queen's writs, or other disrespect to the court's authority. [Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour; by obstinacy, perverseness or prevarication; by breach of the peace, or any wilful disturbance whatever: others in the absence of the party; as by disobeying or treating with disrespect the sovereign's writ, or the rules or process of the court; by perverting such writ or process to the purpose of private malice, extortion, or injustice; by speaking or writing contemptuously of the court, or judges, acting in their judicial capacity; by printing false accounts or even true ones] (against the prohibition of the court (*l*)), [of causes then depending in judgment; and by anything,

(*h*) Vide sup. vol. III. p. 632, n. (*c*).

(*i*) Vide sup. vol. III. p. 357.

(*k*) Peers and persons having privilege of parliament enjoy no exemption in this respect; at least if the contempt be gross. R. *v.* Earl Ferrers, 1 Burr. 631; 2 Arch. Pr. 1653; Lords' Journal, 7th Feb., 8th June, 1757.

(*l*) See R. *v.* Clement, 4 B. & Ald. 218.

[in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority, (so necessary for the good order of the kingdom,) is entirely lost among the people.

The process of attachments for these and the like contempts, must necessarily be as antient as the laws themselves. For laws without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised, as early as the annals of our law extend. And though a very learned author (*m*) seems inclinable to derive this process from the Statute of Westminster the second, 13 Edward I. c. 39,—which ordains that in case the process of the king's courts be *resisted* by the power of any great man, the sheriff shall chastise the resisters by imprisonment, "*a quâ non deliverentur sine speciali præcepto domini regis;*" and that if the sheriff himself be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consentors, commanders and favourers, and that by a special writ judicial they shall be *attached* by their bodies to appear before the court; and that if they be convicted thereof they shall be punished at the king's pleasure, without any interfering by any other person whatsoever:—yet he afterwards more justly concludes, that it is a part of the *law of the land*, and as such is *confirmed* by the statute of *Magna Charta.*

If the contempt be committed in the face of the court, the offender may be instantly apprehended, and imprisoned at the discretion of the judges, without any further proof or examination (*n*). But in matters that arise at a distance, and of which the court cannot have so perfect a

(*m*) Gilb. Hist. C. P. ch. 3.

(*n*) Staundf. P. C. 73.

[knowledge, unless by the confession of the party or the testimony of others, if the judges, upon *affidavit*, see sufficient ground to suspect that a contempt has been committed, that is, an actual contempt,—for upon a merely constructive one, for non-payment of money or the like, the party is attached at once, and sent to prison for satisfaction of the demand, as in any other case of civil debt (*o*) —they either make a rule on the suspected party to show cause why an attachment should not issue against him (*p*); or, in very flagrant instances of contempt the attachment issues in the first instance (*q*). This process of attachment is merely intended to bring the party into court; and when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt (*r*). These interrogatories are in the nature of a charge or accusation; and must, by the course of the court, be exhibited within the first four days (*s*); and if any of the interrogatories be improper, the defendant may refuse to answer it, and move the court to have it struck out (*t*). If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury (*u*). If he confesses the contempt, the court will proceed to correct him by fine or imprisonment, or both; and sometimes by a corporal or infamous punishment. If the contempt be of such a nature, that, when the fact is once acknowledged, the court can receive no further information by interrogatories than it is already possessed of, (as in the case of a *res*-

(*o*) Against persons having privilege of parliament, the proceedings in such contempts as these may be by distress. 10 Geo. 3, c. 50.

(*p*) Styl. 277. As to the cases in which the rule will be absolute in the first instance, see Reg. Gen. Hil. T. 1853, (Pr.) r. 168.

(*q*) Anony. Salk. 84; R. *v.* Jones, Stra. 185; R. *v.* Cambridge, ib. 564.

(*r*) See The Queen *v.* Hemsworth, 3 C. B. 749.

(*s*) Saunders *v.* Melhuish, 6 Mod. 73.

(*t*) R. *v.* Barber, Stra. 444.

(*u*) Saunders *v.* Melhuish, ubi sup.

[*cous* (*x*),) the defendant may be admitted to make such simple acknowledgment, and receive his judgment, without answering to any interrogatories; but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court (*y*).

It cannot have escaped the attention of the reader, that this method of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance (*z*); and seems indeed to have been derived] to the superior courts of the common law, [through the medium of the courts of equity. For the whole process of the courts of equity (*a*), in the several stages of a cause, and finally to enforce their decrees, was originally in the nature of a process of contempt; acting only *in personam* and not *in rem.*] Though there is this difference, that in equity, after the party has answered the interrogatories, his answer may be contradicted and disproved by his adversary; [whereas in the courts of law, the admission of the party to purge himself on oath is more favourable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed.] Whatever may be the origin, however, of this anomalous method of examining the delinquent himself upon oath, with regard to the contempt alleged, it is of high antiquity (*b*); as much so indeed as the process by attachment itself; [and by long and immemorial usage, it is now become the law of the land.]

(*x*) R. *v.* Elkins, 4 Burr. 2129.

(*y*) Usually by fine or imprisonment, or both, see The Queen *v.* Hemsworth, 3 C. B. 745.

(*z*) Vide sup. p. 13.

(*a*) Vide sup. p. 43.

(*b*) M. 5 Edw. 4, rot. 75, cited in Rast. Ent. 263, pl. 5.

CHAPTER XVI.

OF ARRESTS FOR FELONY OR MISDEMEANOR.

[We are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction;] viz. that which is pursued where the offence amounts to felony or misdemeanor, and is consequently a subject for indictment, and not (in general (*a*)) for a summary conviction. This subject may be distributed under eleven general heads, following each other in progressive order, viz.

I. Arrest. II. Commitment and bail. III. Prosecution. IV. Process. V. Arraignment and its incidents. VI. Plea and issue. VII. Trial and conviction. VIII. Judgment and its consequences. IX. Reversal of judgment. X. Reprieve or pardon. XI. Execution. All which will be discussed in the subsequent part of this book.

First, then, of an *arrest;* which, in the sense here referred to (*b*),] is the apprehending or restraining of the person of a man, in order that he shall [be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in criminal cases; and, in general, an arrest may be made four ways. 1. By warrant. 2. By an officer without

(*a*) As to the cases in which cases of *larceny* may be disposed of summarily before justices, vide sup. pp. 394—396; and as to another exception to the general rule, in the case of assaults and batteries, vide sup. p. 397.

(*b*) An arrest, as we have seen, may also take place in civil cases; (vide sup. vol. III. p. 566;) and also in proceedings by way of summary conviction. Vide sup. p. 398.)

[warrant. 3. By a private person, also without warrant. 4. By a hue and cry.]

1. A warrant may be granted, in cases of treason or other offence affecting the government, by the privy council or one of the secretaries of state (c). Any judge also of the Court of Queen's Bench may at common law, in his character of conservator of the peace (d), issue his warrant to bring before him for examination a person charged with felony (e); and by 36 Geo. III. c. 77, s. 18, 35 Geo. III. c. 96, and 48 Geo. III. c. 58, such judge has authority to grant a warrant for commitment in cases of misdemeanor, upon indictment found or information granted in the Court of Queen's Bench: a like power to which is exercised by courts of oyer and terminer, and by the justices at sessions upon indictments, either for felony or misdemeanor, found within their jurisdictions respectively (f).

But warrants are ordinarily issued by justices of the peace out of sessions; a subject on which the law has been lately consolidated by 11 & 12 Vict. c. 42 (g).

(c) 1 Chit. Cr. L. 34, 107; Hawk. P. C. b. 2, c. 16; 4 Bl. Com. 290; see Kendal v. Row, 1 Ld. Raym. 65; R. v Wilkes, 2 Wils. 151; R. v. Despard, 7 T. R. 736; 11 Harg. St. Tr. 318. See also as to the power of a secretary of state to remove a prisoner by warrant from Ireland, in order to his trial in England. (Sedley v. Arbouin, 3 Esp. 178.) A practice had obtained in the secretary's office ever since the Restoration, grounded on some clauses in the Act for regulating the press, of issuing *general* warrants to take up, (without naming any persons in particular,) the authors, printers and publishers of such obscene or seditious libels as were particularly specified in the warrants. When those Acts expired in 1694, the same practice was inadvertently continued in every reign, and under every administration, except the four last years of Queen Anne, down to the year 1763; when such a warrant being issued to apprehend the authors, printers, and publishers, of a certain seditious libel, its validity was disputed; and the warrant was adjudged by the whole Court of Queen's Bench to be void. (Money v. Leach, 3 Burr. 1742; S. C. 1 Bl. Rep. 555.) After this case the issuing of such general warrants was declared illegal, by a vote of the house of commons. (Com. Journ. 22nd April, 1766.)

(d) Vide sup. vol. II. p. 648.

(e) 1 Chit. Cr. L. 36.

(f) Ibid. 339.

(g) The statute 11 & 12 Vict. c. 42, is, by sect. 29, not to alter or

This statute provides in substance, that in all cases where a charge, or complaint, shall be made—before one justice of the peace, or more, for any county or place in England or Wales,—that any person has committed, or is suspected to have committed, any treason or other felony, or any indictable misdemeanor or offence whatsoever, within the limits of their jurisdiction; or that any person who has committed, or is suspected to have committed, such offence out of their jurisdiction (*h*), resides, or is, or is suspected to reside or be, within the same:—then, (if the party shall not be in custody,) the justice or justices may issue a warrant to apprehend him; and may cause him to be brought before them, or any other justice or justices of the same county or place, to answer for the charge or complaint, and to be dealt with according to law; or they may, at their discretion, issue a summons, in the first instance,—in lieu of a warrant,—and forbear to proceed by warrant until the summons has been disobeyed. But there is this distinction: that where a warrant in the first instance is applied for, an *information* or *complaint* in writing, and upon oath, must be laid before the justices; but where only a summons, the information or complaint may be by parol, and no oath is necessary. The form of the warrant is prescribed by the statute itself (*i*); and [a warrant properly penned, even though the magistrate who issues it should exceed his jurisdiction, will by statute 24 Geo. II. c. 44, at all events indemnify the officer who executes the same ministerially.] On the other hand, when a warrant is received by the officer, he is bound to

affect any of the provisions in 10 Geo. 4, c. 44; 2 & 3 Vict. cc. 47, 71; 3 & 4 Vict. c. 84; or of the London Police Act, 2 & 3 Vict. c. xciv.

(*h*) 11 & 12 Vict. c. 42, s. 1. By sect. 2 this extends to offences committed within the jurisdiction of the Admiralty, or on land beyond the seas; if the ase be one for which an indictment may legally be preferred in England or Wales.

(*i*) The form of the warrant and summons, and of all other proceedings under the Act, is given in a schedule thereto. We may remark here, that the case is the same, with respect to all other instruments used in the proceedings.

[execute it so far as the jurisdiction of the magistrate and himself extends;] and he may break open doors, in order to execute a warrant for treason, felony, or actual breach of the peace,—if, on demand, admittance cannot otherwise be obtained (*k*): nor is there any immunity from arrest for any such offence, in the night time (*l*); nor from an arrest, for any indictable offence, on Sundays (*m*). A justice of the peace may issue a warrant, not only to apprehend a person suspected of felony, but to search his premises for goods alleged to be stolen; and by 7 & 8 Geo. IV. c. 29, s. 63, if any credible witness shall, upon oath, prove before a justice of the peace a reasonable cause to suspect that any person has in his possession, or on his premises, any property whatsoever, in respect to which any offence punishable under that Act shall have been committed,—the justice may grant a warrant to search for such property, as in the case of stolen goods: and any person to whom any such property shall be offered to be sold, pawned, or delivered, is required, (if in his power,) to apprehend and carry before a justice of the peace the person offering the same, together with such property.

[A warrant from the chief or other justice of the Court of Queen's Bench extends all over the kingdom; and is *tested*, (or dated,) *England*; not *Oxfordshire*, *Berks*, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be *backed*, that is, indorsed by a justice of the peace in another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county, but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes;] of which the most recent are the

(*k*) 1 Chit. Cr. L. 49; Rawlins *v.* Ellis, 16 Mee. & W. 172.

(*l*) As to homicide committed in resisting officers acting under warrants, vide sup. p. 144.

(*m*) 29 Car. 2, c. 7, s. 6, and see 11 & 12 Vict. c. 42, s. 4. An arrest in civil cases is not permitted on Sundays, sup. vol. III. p. 652, n. (*u*).

11 & 12 Vict. c. 42, and the 14 & 15 Vict. c. 55, s. 18. By these statutes a warrant issued in England or Wales may be backed, not only in another English county or place, but in Scotland, Ireland, or the Channel Islands, or *vice versâ* (*n*).

2. [Arrest by officers *without warrant*, may be executed, 1. By a justice of the peace, who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence (*o*); 2. The sheriff; and, 3. The coroner (*p*) may apprehend any felon within the county, without warrant; 4. The constable, of whose office we formerly spoke (*q*), hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for] a treason, felony, or [breach of the peace committed in his view, and carry him before a justice of the peace (*r*).] So upon a reasonable charge of treason, or felony,—or of a

(*n*) The provisions of 11 & 12 Vict. c. 42, as to backing warrants, are by 11 & 12 Vict. c. 43, s. 3, extended to warrants in cases of summary conviction. We may also notice here other enactments of a character somewhat analogous. By 6 & 7 Vict. c. 34, (amended by 16 & 17 Vict. c. 118,) provisions are made as to the apprehension, in the united kingdom, of persons committing treason and felony in her majesty's dominions out of the united kingdom; and *vice versâ* as to the apprehension in those dominions, of persons so offending in the united kingdom. By 6 & 7 Vict. c. 75, (amended by 8 & 9 Vict. c. 120,) provisions are also made for carrying into effect a convention entered into by her Majesty and the late King of the French, (determinable at pleasure,) for the apprehension of offenders in the two countries, respectively, in cases of murder or attempts to commit murder; forgery; or fraudulent bankruptcy: and by 6 & 7 Vict. c. 76, (amended by 8 & 9 Vict. c. 120,) regulations for carrying into effect a similar convention with the United States of America, in cases of murder, or attempts to commit murder; piracy; arson; robbery; forgery, or uttering forged paper.

(*o*) 1 Hale, P. C. 86.

(*p*) Jervis on Coroners, 21.

(*q*) Vide sup. vol. II. p. 656.

(*r*) Within the metropolitan police district, a constable may take into custody, without warrant, all persons whom he may find, between sunset and the hour of eight in the morning, loitering or lying about and unable to give a satisfactory account of themselves,—or persons charged with aggravated assaults,—or persons offending against the metropolitan police Acts, whose address

dangerous wounding, whereby felony is likely to ensue,—or, upon his own reasonable suspicion that any of such offences have been committed, he may, without warrant, arrest the party so charged or suspected; and he will be justified in doing so though it should afterwards turn out that the party is innocent, or even that no such offence has been in fact committed (*s*). He is also authorized in these cases, as well as upon a justice's warrant, to break open doors (*t*). 5. [Watchmen, either those appointed by the statute of Winchester, (13 Edw. I. c. 4,) to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to the constable, may, *virtute officii*, arrest all offenders, and particularly nightwalkers; and commit them to custody till the morning (*u*).

3. Any private person (and *à fortiori* a peace officer), that is present when any felony is committed; is bound by the law to arrest the felon, on pain of fine and imprisonment], if he is negligently permitted to escape (*x*); and, by 14 & 15 Vict. c. 19, ss. 10, 11, may apprehend any person found committing any offence against the provisions of the statute (*y*), or any indictable offence, by *night;* that is, between nine in the evening, and six in the morning of the next day. They may also, in the case of a person committing a felony in their presence, justify breaking open doors in pursuit of him. Upon probable suspicion, moreover, any one,—even [a private person,—may arrest the

cannot be ascertained. See 10 Geo. 4, c. 44; 2 & 3 Vict. c. 47, ss. 36, 64, 65; 17 & 18 Vict. c. 33, s. 1, as to the limits of the metropolitan police district.

(*s*) Davis *v.* Russell, 5 Bing. 354; Beckwith *v.* Philby, 6 B. & C. 635.

(*t*) 4 Bl. Com. 292. By 7 & 8 Geo. 4, c. 29, (the Larceny Act,) and 7 & 8 Geo. 4, c. 30, (the Malicious Injuries Act,) a person committing any offence under the same, (except the offence of angling in the day-time,) may immediately be apprehended without warrant, by a peace officer or by the owner of the property. See also the Vagrant Act, 5 Geo. 4, c. 83, s. 6; the Metropolitan and London Police Acts, (sup. p. 398, n. (*n*)), and the Act for the Prevention of Dog Stealing, 8 & 9 Vict. c. 47, s. 5.

(*u*) 2 Hale, P. C. 90, 91.

(*x*) Hawk. P. C. b. 2, c. 12.

(*y*) Vide sup. p. 180.

[felon or other person so suspected (z).] But there is this distinction between the case of the peace officer, and that of the private person; that the former is protected, (as we have seen,) though it should turn out that no such crime as supposed had been in fact committed by any one; provided he had reasonable ground for suspecting the party arrested: but the latter acts more at his peril; and is not protected, unless he can prove an actual commission of the crime by *some one*, as well as a reasonable ground for suspecting the particular person (a). It is also to be observed, that a private person cannot, on mere suspicion, justify breaking open doors (b); which a constable (as before shown),—though acting without a warrant,—is competent to do.

4. [There is yet another species of arrest, wherein both officers and private men are concerned; and that is upon a *hue* and *cry* raised upon a felony committed (c). A *hue*, (from *huer*, to shout) and cry, *hutesium et clamor*, is the old common law process of pursuing with horn and with voice, all felons, and such as have dangerously wounded another (d).] If in a hue and cry, the constable, or peace officer, concur in the pursuit, he has [the same powers, protection and indemnification, as if acting under a warrant of a justice of the peace (e).] Indeed all those who join in following upon a hue and cry that has been raised,—and that whether a constable be present or not,—will be justified in their apprehension of the party pursued, even though it should ultimately turn out that he is innocent, or that no

(z) 2 Hale, P. C. 98.

(a) Fost. 318. See Adams v. Moore, 2 Selw. N. P. 865; Moore v. Raye, 4 Taunt. 34; Beckwith v. Philby, 6 B. & C. 635; Williams v. Crosswell, 2 C. & K. 422.

(b) 4 Bl. Com. 292. See Smith v. Shirley, 3 C. B. 142. As to homicide in resisting an arrest by a private person, see 2 Hale, Pl. 84; Foster, 272, 309, 318.

(c) As to hue and cry, vide 2 Hale, P. C. 100, et seq.

(d) The statutes relating to hue and cry, 13 Edw. 1, st. 2, cc. 1 and 4; 27 Eliz. c. 13, and 8 Geo. 2, c. 16; are repealed by 7 & 8 Geo. 4, c. 27.

(e) Vide sup. p. 144.

felony has been committed (*f*); and, where the party pursued has taken refuge in a house, may break open the door to secure him, if admittance be refused (*g*). But if a man wantonly or maliciously raises a hue and cry without cause, he is liable to fine and imprisonment (*h*); and is also liable to an action at the suit of the party injured.

In order to encourage the apprehension of offenders in certain cases, it is provided by 7 Geo. IV. c. 64, s. 28 (*i*), that when any person shall appear to any court of oyer and terminer, gaol delivery, or of sessions of the peace, to have been active in or towards the apprehension of any person charged with murder; or charged with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at, any other person; or with stabbing, cutting, or poisoning, or with administering any thing to procure the miscarriage of any woman; or with rape; or with burglary or felonious housebreaking; or with robbery; or with arson; or with horse stealing, bullock stealing, or sheep stealing; or with being accessory before the fact to any of the offences aforesaid; or with receiving any stolen property knowing the same to have been stolen;—every such court is authorized, in any of the cases aforesaid, to order the sheriff of the county to pay to the person or persons, who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said

(*f*) Hawk. P. C. b. 2, c. 12, s. 16.

(*g*) Hale, P. C. 102.

(*h*) Hawk. P. C. b. 2, c. 12, s. 16.

(*i*) This section is amended and extended by 14 & 15 Vict. c. 55, and the provisions apply, also, to any superior court of a *county palatine*. The previous enactments relating to rewards for the apprehension of offenders, contained in 4 & 5 W. & M. c. 8; 6 & 7 Will. 3, c. 17; 10 & 11 Will. 3, c. 23; 5 Ann. c. 31; 6 Geo. 1, c. 23; 6 Geo. 2, c. 6; 15 Geo. 2, c. 28; 16 Geo. 1, c. 23; 8 Geo. 2, c. 16; 14 Geo. 2, cc. [illegible]; 15 Geo. 2, c. 34; 16 Geo. 2, c. 15; 8 Geo. 3, c. 15; 58 Geo. 3, c. 70, are now repealed. The repealing Acts are 58 Geo. 3, c. 70; 5 Geo. 4, c. 84; 7 Geo. 4, c. 64; 7 & 8 Geo. 4, c. 27; 2 Will. 4, c. 34.

offences, such sum of money as shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions and loss of time, in or towards such apprehension (*k*): but this power is to be exercised subject to such regulations, as to the rate of allowance, as shall be made from time to time by a principal secretary of state.

(*k*) And see 7 Geo. 4, c. 64, s. 30, as to compensation to the families of those who are *killed* in attempting to apprehend persons charged with such offences as are mentioned in the text; and 14 & 15 Vict. c. 55, s. 7, providing that nothing in that Act, as to the regulations under which the power of allowance is to be exercised, shall interfere with the power of the court to order payment to any person who shall have shown extraordinary courage, diligence, or exertion in the apprehension. See also 19 & 20 Vict. c. 16, s. 13, as to compensation in cases removed for trial to the Central Criminal Court, under that Act.

CHAPTER XVII.

OF COMMITMENT AND BAIL.

[WHEN a delinquent is arrested, by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace; and how he is there to be treated, is now to be shown, under the second head of *commitment* and *bail*.

The justice before whom such prisoner is brought (*a*) is bound immediately to examine the circumstances of the crime alleged]; and to this end the following provisions are made by the statute 11 & 12 Vict. c. 42 (*b*); viz. that the justice or justices shall take, in the presence of the prisoner, the examinations on oath (or depositions) of those who know the facts of the case, and put the same into writing:—that the room in which such examinations are taken shall not be deemed an open court: and that it shall be lawful for the justice or justices, if it appear to them most conducive to the ends of justice, to order that no person shall have access to the same (*c*):—that after the depositions have been taken, and signed by the witnesses and by the justice or justices, they shall be read over to the prisoner, who shall be asked if he wishes to say anything in answer to the charge (*d*); and whatever he shall say

(*a*) He ought to be brought before the justice, without delay; Wright *v.* Court, 6 D. & R. 623.

(*b*) This subject was at one period regulated by 2 & 3 Ph. & M. c. 10, and afterwards by 7 Geo. 4, c. 64. The first of these Acts was repealed by the second; and this last, (so far as this subject is concerned,) by 11 & 12 Vict. c. 42.

(*c*) 11 & 12 Vict. c. 42, s. 19.

(*d*) It is not the practice to examine the prisoner himself, otherwise than by thus calling on him for

shall be taken down in writing, and read over to him, and signed by the justice or justices,—after a previous caution to the prisoner, that he has nothing to hope or fear from any promise or threat that may have been held out; and that, (notwithstanding any such promise or threat,) his statement may be read in evidence against him (*e*). And further:—that if, upon the whole inquiry, the justice or justices shall be of opinion that the evidence is not sufficient to put the prisoner upon his trial, they shall order him to be discharged; but if they shall be of the opposite opinion, or if the evidence raise a strong or probable presumption of his guilt, they shall either commit him to prison, (as hereafter mentioned,) or admit him to bail,—that is, allow him to be discharged, on entering into a recognizance, (with some sufficient surety or sureties,) to appear and surrender himself to custody, to take his trial on such indictment as may be found against him, in respect of the charge in question, at the next assizes or sessions of the peace.

The justices, however, have no power to admit any person to bail for treason; nor shall bail in that case, be allowed except by order of a secretary of state, or by the Court of Queen's Bench, or a judge thereof in vacation: while, on the other hand, they are bound to admit to bail in all cases of misdemeanor, except such as the Act of 11 & 12 Vict. c. 42, particularly enumerates; and as to all felonies (treason excepted), as well as to the misdemeanors so enumerated, they have a discretionary power either to admit to bail (*f*), or to commit to prison (*g*).

his defence; and this corresponds with the ancient law; "for by the canon law," says Blackstone, (vol. iv. p. 296,) "*nemo tenetur prodere seipsum.*"

(*e*) 11 & 12 Vict. c. 42, s. 18. As to this provision, see Reg. *v.* Stripp, 1 Dearsley's C. C. R. 648.

(*f*) Formerly there were many other cases besides treason in which justices of the peace had no power to bail; for example, that of murder and of arson. See 4 Bl. Com. 299.

(*g*) The misdemeanors for which justices are *not* obliged to take bail, are as follows—assault with intent to commit felony; obtaining or attempting to obtain property by false

[To refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magistrate, by the common law (*h*), as well as by the statute of Westminster the first, (3 Edw. I. c. 15,) and the *Habeas Corpus* Act, (31 Car. II. c. 2 (*i*)). And lest the intention of the law should be frustrated, by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by 1 W. & M. st. 2, c. 1, that excessive bail ought not to be required; though what bail shall be called excessive must be left to the courts, on considering the circumstances of the case, to determine. And on the other hand, if the magistrate take insufficient bail, he is liable to be fined, if the criminal doth not appear (*k*).]

Such, as the law now stands, is the power of the justices of the peace in bailing prisoners brought before them (*l*). It is to be understood, however, that in this matter, the Court of Queen's Bench exercises a paramount jurisdiction;—having authority to bail, not only in cases where the charge is originally before that court, but also in cases where it is brought before justices of the peace, and bail is refused by them. Nor is there any limit whatever to the

pretences; receiving property stolen or obtained by false pretences; perjury or subornation of perjury; concealing the birth of a child by secret burying or otherwise; wilful and indecent exposure of the person; riot; assault in pursuance of a conspiracy to raise wages; assault upon a police officer in the execution of his duty, or upon any person acting in his aid; neglect or breach of duty as a peace officer; and any misdemeanor, for prosecution of which the costs may be allowed. (11 & 12 Vict. c. 42, s. 23.)

(*h*) Hawk. P. C. b. 2, c. 15, s. 13. See Queen *v.* Badger, 4 Q. B. 468; Linford *v.* Fitzroy, 13 Q. B. 240.

(*i*) See also 56 Geo. 3, c. 100.

(*k*) Hawk. P. C. b. 2, c. 15, s. 6; and see 7 Geo. 4, c. 64, ss. 5, 6; R. *v.* Saunders, 2 Cox's Cr. C. 219.

(*l*) The court before which a prisoner is brought has also power to bail him; and, in certain cases, the coroner, sheriff or other magistrate. (4 Bl. Com. 297.) As to the power of bailing in the *metropolitan police courts*, see 2 & 3 Vict. c. 71, s. 36; and in the case of *juvenile offenders* charged with simple larceny, 10 & 11 Vict. c. 82, s. 5. See also 18 & 19 Vict. c. 126, ss. 5, 6, as to persons charged with larceny, &c., under that Act.

power of the Queen's Bench in this particular: for [that court (*m*),—or any judge (*n*) thereof in time of vacation,—may bail for any crime whatsoever, be it treason (*o*), murder (*p*) or any other offence, according to the circumstances of the case] It is not usual, however, either for the Court of Queen's Bench, or for magistrates, to admit to bail in any case of felony, except under circumstances of a special and favourable kind (*q*).

Supposing no bail to be allowed, or none to be found by the accused, he is then to be committed by warrant (*r*) of the justice, or justices, to the common gaol or house of correction (*s*), to be there safely kept until delivered by due course of law. [But this imprisonment is only for safe custody, and not for punishment; and therefore, in this dubious interval between the commitment and trial, a prisoner ought to be treated with the utmost humanity; and neither be loaded with needless fetters, nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement.]

In either case, whether of bailing or commitment, the accused is entitled to demand, from the person having the custody of the same, copies of the examinations (or depositions) on which he shall have been bailed or committed (*t*),

(*m*) 2 Inst. 189; Latch. 12; Vaug. 157; Comb. 111, 298; 1 Com. Dig. 495.

(*n*) Skin. 683; Salk. 105; R. *v.* Dalton, Stra. 911; 1 Com. Dig. 497.

(*o*) In the reign of Queen Elizabeth, however, it was the unanimous opinion of the judges, that no court could bail a person committed, on a charge of high treason, by any of the queen's privy council. (1 Anders. 298.)

(*p*) Antiently felonious homicide seems to have been an exception. "*In omnibus placitis de felonia solet accusatus per plegios dimitti, prætérquam in placito de homicidio.*" (Glan. l. 14, c. 1.) "*Sciendum tamen quod, in hoc placito, non solet accusatus per plegios dimitti, nisi ex regiæ potestatis beneficio.*" (Ibid. c. 3.)

(*q*) See Barronet's case, 1 Dearsley's C. C. R. 51.

(*r*) 11 & 12 Vict. c. 42, s. 25. The form of this warrant is prescribed by the schedule to the Act.

(*s*) See the law, as to the place of commitment, more fully stated, sup. vol. III. p. 225.

(*t*) 11 & 12 Vict. c. 42, s. 27. See Queen *v.* Lord Mayor of London, 5 Q. B. 555; R. *v.* Davies and others, 1 L. M. & P. 323.

upon payment for them at a reasonable and prescribed rate: and the justice or justices are also empowered, in either case, to bind over by recognizance the prosecutor and witnesses to appear at the next assizes or sessions of the peace, at which the accused is to be tried, then and there to prosecute or to give evidence: and the several recognizances so taken, together with the written information (if any); the depositions; the statement of the accused; and the recognizance of bail (if any);—the justice or justices are required to deliver, or cause to be delivered, to the proper officer at such assizes or sessions, before or at the opening of the court, on the first day of its sitting (*u*).

(*u*) 11 & 12 Vict. c. 42, s. 20. By 19 & 20 Vict. c. 16, where any person shall have been committed or held to bail for any felony or misdemeanor alleged to have been committed out of the jurisdiction of the Central Criminal Court, (as to which vide sup. p. 380),—the Queen's Bench (or any judge thereof in vacation,) may, if it shall appear expedient to the ends of justice, order the trial of such person to take place at the Central Criminal Court. In such case the examining justice, coroner, or other officer in whose custody the indictment or injunction may be, must forthwith transmit to the proper officer of the Central Criminal Court any recognizances, depositions, examinations or informations relating to the offence charged, to be kept among the records of the Central Criminal Court. And the gaoler or keeper of any gaol or house of correction in which the person charged is confined, is, without writ of *habeas corpus* or other writ for that purpose, to cause such person to be removed to Newgate. (19 & 20 Vict. c. 16, s. 4.)

CHAPTER XVIII.

OF THE SEVERAL MODES OF PROSECUTION.

[THE next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation: and this is either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding. The former way, is either by *presentment* or by *indictment*.

1. A presentment, *generally* taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury, of any offence from their own knowledge or observation (*a*), without any bill of indictment, laid before them at the suit of the Crown:—as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it (*b*). An inquisition of office (*c*), is the act of a jury summoned by the proper officer to inquire of matters relating to the Crown, upon evidence laid before them.] Such inquisitions [may be afterwards traversed and examined (*d*); as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide; for, in such cases, the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it: which brings it to a kind of indictment, the most usual and effec-

(*a*) Lamb. Eirenarch. l. 4, c. 5.
(*b*) 2 Inst. 739.
(*c*) Vide sup. p. 61.
(*d*) Jervis on Coroners, 282.

[tual means of prosecution, and into which we will therefore inquire a little more minutely.

II. An *indictment* is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury (*e*). To this end the sheriff of every county is] directed by a precept, issued for the purpose, [to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and loyal men of the county (*f*), —to inquire into, present, do, and execute all those things which, on the part of] our lady the queen, [shall then and there be commanded them (*g*).] At the sessions of the peace, their qualification is further regulated by stat. 6 Geo. IV. c. 50, s. 1, and is the same as required for common jurors in the trial of civil causes (*h*). At courts of oyer and terminer or gaol delivery, their qualification is not absolutely defined by law: [they ought to be freeholders, but to what amount is uncertain (*i*). However, they are usually gentlemen of the best figure in the county (*k*). As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three (*l*), that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described so early as the laws of King Ethelred (*m*):—"*Exeant seniores duodecim thani, et præfectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxium celare.*" In the time of King Richard the first (according to Hoveden,) the process of electing the grand jury, ordained by that prince, was as follows:—

(*e*) In the case of Quakers, Moravians and Separatists, the presentment of a grand juror may be upon solemn affirmation. See 3 & 4 Will. 4, c. 49, s. 82; and 6 & 7 Vict. c. 85, s. 2.

(*f*) The words "some out of every hundred" used to be added here. But see 6 Geo. 4, c. 50, cited *post*, p. 410.

(*g*) 2 Hale, P. C. 154.

(*h*) Vide sup. vol. III. p. 600, n. (*e*).

(*i*) 2 Hale, P. C. 155.

(*k*) Vide 1 Chit. Cr. L. p. 238.

(*l*) R. *v.* Marsh, 6 Ad. & El. 236.

(*m*) Wilk. LL. Angl. Sax. 117.

[four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient]; but the traces of this institution long remained; for until dispensed with by 6 Geo. IV. c. 50, s. 13, it was held to be necessary that some of the jury should be summoned out of every hundred (*n*). [This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw to sit and receive indictments, which are preferred to them] in the name of the Queen, [but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution (*o*): for the finding of an indictment, is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it (*p*). A grand jury, however, ought to be thoroughly convinced of the truth of an indictment, so far as their evidence goes: and not to rest satisfied merely with remote probabilities:

(*n*) 2 Hale, P. C. 154; 4 Bl. Com. 303.

(*o*) By 19 & 20 Vict. c. 54, the foreman is authorized to administer an oath, (or affirmation where such is allowed by law,) to all persons appearing before the grand jury to give evidence. Before this Act, such persons had to be sworn in open court.

(*p*) Upon an indictment for high treason against the Earl of Shaftesbury, in the year 1681, the evidence was given *in public* before the grand jury at the Old Bailey, and the gentlemen of the jury expressing some doubts with regard to the legality of the proceeding, Lord C. J. Pemberton and C. J. North both declared that it had always been the practice to examine the witnesses publicly before the grand jury, whenever it had been requested by those who prosecuted for the king. (3 Harg. St. Tr. 417.) But it is apprehended this is the last instance of such a procedure. (Christian's Blackstone.) It seems that an improper mode of swearing the witnesses before a grand jury will not vitiate the indictment. R. v. Russel, 1 Car. & M. 247.

[a doctrine that might be applied to very oppressive purposes (q).

The grand jury are sworn to inquire only for the body of the county, *pro corpore comitatus,*] but for no other part of the kingdom, [and therefore they cannot regularly inquire of a fact done out of the county for which they are sworn, unless particularly enabled by Act of Parliament. And to so high a nicety was this matter antiently carried, that where a man was wounded in one county and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them:] but by statute 2 & 3 Edw. VI. c. 24, he might be indicted in the county where the party died, and by statute 7 Geo. IV. c. 64, (repealing that of Edward the sixth,) he is now indictable in either county. Also by statute 9 Geo. IV. c. 31, s. 8 (r), if the stroke or poisoning be in England, and the death upon the sea, or out of England, or *vice versâ,*—the offenders and their accessories may be indicted in the county where either the death, poisoning, or stroke shall happen. [And so in some other cases; as particularly where treason is committed out of the realm, it may be inquired of] in the Queen's Bench, in any county where that court sits: or, under a special commission of oyer and terminer, [in any county within the realm, as the Crown shall direct, in pursuance of statutes 26 Hen. VIII. c. 13;] 28 Hen. VIII. c. 15; [35 Hen. VIII. c. 2, and 5 & 6 Edw. VI. c. 11 (s).] And offences committed at sea, or within the Admiralty jurisdiction, made by 4 & 5 Will. IV. c. 36, s. 22, and 7 & 8 Vict. c. 2 (t), may be inquired of and determined in our own courts of assize, oyer and terminer, and gaol-de-

(q) St. Tr. iv. 183.

(r) This repealed a former provision to the same effect, 2 Geo. 2, c. 21.

(s) Another Act of 33 Hen. 8, c. 23, is repealed by 9 Geo. 4, c. 31.

(t) And see 17 & 18 Vict. c. 104, s. 267, by which offences committed by British seamen, out of her majesty's dominions, are to be deemed to have been committed within the Admiralty jurisdiction.

livery (u). And by 42 Geo. III. c. 85, offences committed by persons employed in any public station abroad, may be prosecuted in the Queen's Bench in England (x). In addition to which, there are to be found in the statute book, a variety of other and more specific exceptions from the general principle, introduced from time to time, to prevent the failure of justice, or to promote its convenient administration (y). It is also provided generally by 7 Geo. IV. c. 64, and 11 & 12 Vict. c. 46, that the offence of any accessory to a felony, whether before or after the fact, may be inquired of by any court which has jurisdiction to try the principal felon; and as if such offence had been committed at the same place as the principal felony, although in fact committed elsewhere: and by the first of these statutes, in case the offence of the principal felon shall be committed in one county, and that of the accessory before the fact in the other, that the trial may be in either. And further, that where any felony or misdemeanor shall be committed on

(u) Vide sup. p. 376. In certain cases, however, offences committed within the Admiralty jurisdiction, may be tried in the courts of the colony where the person is charged. See 12 & 13 Vict. c. 96.

(x) Et vide 11 & 12 Will. 3, c. 12; 8 East, 31.

(y) See as to the offences of *extortion*, 31 Eliz. c. 5, s. 4, (et 2 Chit. Cr. Law, 294, n.)—As to *robberies, &c. in Newfoundland*, 10 & 11 Will. 3, c. 25, s. 13.—As to *burning ships, &c. out of the realm*, 12 Geo. 3, c. 24, s. 2. —As to *misdemeanors in India*, 13 Geo. 3, c. 63.—As to *seducing soldiers, &c.*, 37 Geo. 3, c. 70, s. 2; 57 Geo. 3, c. 7.—As to *offences against stamp acts*, 53 Geo. 3, c. 108, s. 24; 55 Geo. 3, c. 184, s. 8.—As to *Foreign Enlistment Act*, 59 Geo. 3, c. 69, s. 9.—As to *offences by pilots*, 1 & 2 Geo. 4, c. 75, s. 22.—As to *escapes, prison-breach, and rescue*, 4 Geo. 4, c. 64, s. 44.—As to *embezzlement by public officers*, 2 Will. 4, c. 4, s. 5.—As to *offences relative to coin, in certain cases*, 2 Will. 4, c. 34, s. 15.—As to *offences against the excise*, 7 & 8 Geo. 4, c. 53, s. 43.—As to *offences committed in coaches or vessels*, 7 Geo. 4, c. 64, s. 13. (See Sharpe's case, 1 Dearsley's C. C. R. 415.)—As to *the offence of receiving stolen goods*, 7 & 8 Geo. 4, c. 29, ss. 56, 76.—As to *plundering cargoes*, 7 & 8 Geo. 4, c. 29, s. 18; sed vide 7 Will. 4 & 1 Vict. c. 87, s. 1.—As to *murder or manslaughter out of the realm, on land*, 9 Geo. 4, c. 31, s. 7.—As to *bigamy*, 9 Geo. 4, c. 31, s. 22.—As to *forgery, &c.*, 11 Geo. 4 & 1 Will. 4, c. 66, s. 24.—As to *offences against the Post Office*, 7 Will. 4 & 1 Vict. c. 36, s. 37.—As to *offences against the customs*, 16 & 17 Vict. c. 107, s. 304.—As to *offences committed on British ships*, 18 & 19 Vict. c. 91, s. 21.

the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another,—every such felony or misdemeanor may be dealt with and tried in any of the counties (*z*). Moreover it is enacted by 4 & 5 Will. IV. c. 36, s. 3, as to all offences committed within the jurisdiction of the "Central Criminal Court" (*a*), that the whole metropolitan district over which it extends shall be considered, for the purpose of indictment, as one county (*b*). And by 38 Geo. III. c. 52, that where an offence has been committed within the county of a city or town corporate (*c*), (except London, Westminster, or the borough of Southwark,) the indictment may be preferred to the jury of the next adjoining county (*d*). Besides all which, it is to be remarked in reference to this subject, that independently of legislative provision, it is in the nature of some offences to admit, at the common law, of inquiry and trial in more counties than one. Thus in treason committed within the realm, the indictment may be in any county, in which any one overt act can be proved (*e*); and in conspiracy, in any county in which any act may have been committed in furtherance of the common design (*f*). So if a man commit a simple larceny in one county, and carry the goods

(*z*) 7 Geo. 4, c. 64, s. 9. As to this section, vide R. *v.* Mitchell, 2 Gale & D. 274.

(*a*) As to this court, vide sup. pp. 380, 381.

(*b*) The jurisdiction of this court also comprises offences committed at sea, (vide sup. p. 377). It may be observed here, that persons convicted in this court of any offence, on the trial of an indictment or inquisition removed thither under 19 & 20 Vict. c. 16, may, (by sect. 19 of that Act,) be sentenced and punished either in the county where the offence was committed, or within the jurisdiction of the Central Criminal Court.

(*c*) Vide sup. vol. I. p. 133.

(*d*) Et vide 14 & 15 Vict. c. 100 s. 23, as to the trial of offences committed in counties corporate and boroughs generally, see also 51 Geo. 3, c. 100; 60 Geo. 3, c. 14, s. 3; 7 Geo. 4, c. 64, s. 25; 5 & 6 Will. 4, c 76, s. 113; 2 & 3 Vict. c. 72; 14 & 15 Vict. c. 55, ss. 19, 21—24; 17 & 18 Vict. c. 35.

(*e*) Deacon's case, Foster, 10.

(*f*) R. *v.* Brisac and Scott, 4 East, 164.

with him into another, he may be indicted in either: for the law considers this as a taking in both (*g*).

[When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill "*ignoramus*," or we know nothing of it; intimating that though the facts might possibly be true, that truth did not appear to them; but now they assert in English more absolutely, "not a true bill," or (which is the better way) "not found," and then the] bill is said to be "thrown out," and the [party is discharged without further answer (*h*). But a fresh bill may afterwards be preferred to a subsequent grand jury (*i*). If they are satisfied of the truth of the accusation, they then indorse upon it, "a true bill;" antiently "*billa vera.*" The indictment is then said to be *found*; and the party stands indicted. But to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the Crown of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards by the whole petit jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest

(*g*) 1 Hale, P. C. 507; 2 Hale, P. C. 163; 4 Bl. Com. 305. Also by the Larceny Act, 7 & 8 Geo. 4, c. 29, s. 76, if property be taken in one part of the united kingdom, and the offender afterwards have it in his possession in any other part of the united kingdom, he may be dealt with for theft in that part where he shall so have such property, as if he had actually stolen it there. And a receiver of stolen property may be dealt with in that part of the united kingdom where he shall receive the property, as if it had been originally stolen there.

(*h*) If the bill be thrown out by the grand jury, the party must be discharged without the payment of any fees. (8 & 9 Vict. c. 114.)

(*i*) If the grand jury at the assizes or sessions have thrown out a bill, they cannot find another bill against the same person for the same offence, at the same assizes or sessions. (R. *v.* Humphreys, 1 Car. & Mar. 601.)

[disagree (*k*).] And the indictment when so found (or not found, as the case may be) is then returned, or [publicly delivered into court; and the finding of the jury openly proclaimed.

Indictments must have a precise and sufficient certainty;] and, in their margin, they constantly mention the county in which the offence was committed; which is done by way of *venue* (*l*), that is, by way of indicating from what county the jurors came, by whom the indictment was found. In the body also of this instrument there was formerly always inserted,—by way of more particular venue, and to indicate the place from whence the petit jury, who are afterwards to try the fact, would, according to the antient usage, have been summoned (*m*),—an allegation of the town, hamlet, or parish, in which the fact is supposed to be committed (*n*), as well as of the day of its commission. But by 14 & 15 Vict. c. 100, s. 23, it is now unnecessary to state any *venue* in the body of the indictment; but the county in the margin shall be taken to be the venue for all the facts: except where it is requisite to state a place by way of local description, and not merely as venue; in which case the place shall still be stated in the body of the indictment. So by the same statute (sect. 24) an omission to state the *time*, or any imperfect statement of it,—where time is not of the essence of the offence,—shall constitute no objection (*o*). But cases occasionally occur in which time *is* of the essence of the offence, for example, [where there is any limitation in point of time, assigned for the prosecu-

(*k*) 2 Hale, P. C. 161.

(*l*) As to *venue* in civil cases, vide sup. vol. III. p, 569.

(*m*) At common law, the petit jury, who are to try the fact in issue, was summoned from the particular place where the fact in issue occurred. (Et vide Hawk. P. C. b. 2, c. 23, s. 92; sup. vol. III. p. 597, n. (*m*).) But this principle has been long obsolete; and by 6 Geo. 4, c. 50, s. 13, they are now to be summoned from the body of the county; and not even from any particular hundred within the same.

(*n*) Vide R. *v.* Brookes, 1 Car. & M. 543.

(*o*) The law seems to have been nearly the same, even before this statute. 4 Bl. Com. 306.

[tion of offenders; as by the statute 7 Will. III. c. 3, which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination, designed or attempted, on the person of the sovereign), unless the bill of indictment be found within three years after the offence committed (*p*); and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given.]

In other respects, also, indictments must have a precise and sufficient certainty. [By statute 1 Hen. V. c. 5, all indictments must set forth the christian name, surname, and addition of the state and degree, mystery, town, or place, and the county of the offender (*q*); and all this to identify his *person*:] but if his name be unknown, and he refuse to disclose it, an indictment against him as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison, is, notwithstanding this enactment, sufficient (*r*). And now by 14 & 15 Vict. c. 100, s. 24, no want of, or imperfection in, the addition of the defendant shall vitiate the indictment, nor the designation of any person by a name of office or other descriptive appellation instead of his proper name. [The offence itself must also be set forth with clearness and certainty (*s*); and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus in treason, the facts must be laid to be done "treasonably and against his allegiance;" antiently, *proditoriè et contra ligeantiæ suæ debitum;*" else the indictment is void. In indictments for murder, it is necessary to say that the party indicted "murdered," (not "killed" or "slew,")

(*p*) Foster, 249.

(*q*) In case of an indictment for nonfeasance against a corporation, its name of incorporation may be used. 2 Gale & D. 236.

(*r*) Anon., R. & R. C. C. R. 489.

(*s*) See Reg. *v.* Rowed, 3 Q. B. 180.

[the other; which,] till the statute 4 Geo. II. c. 26, directing all proceedings in courts, concerning the law, and administration of justice, to be in English; [was expressed in Latin by the word "*murdravit.*" In all indictments for felonies, the adverb "feloniously," "*felonicè,*" must be used; and for burglarics, also "*burglariter,*" or in English, "burglariously;" and all these to ascertain the intent. In rapes, the word "*rapuit,*" or "ravished," is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcenies, also, the words "*felonicè cepit et asportavit,*" "feloniously took and carried away," are necessary to every indictment; for these only can express the very offence (*t*).] In addition to which we may remark, that where the offence is created by an Act of Parliament, the very words of the Act, containing the description of the offence, should be exactly pursued (*u*).

The precision indeed of our pleadings, (whether in criminal or civil cases,) has ever been remarkable; and up to a recent period was carried to an extravagant length, tending to an excessive subtlety, and overstrained observance of form, very prejudicial to the interests of justice. This blemish on our jurisprudence, (the result, it must be observed, of an overweening attachment to a right principle,) it has been the constant effort of modern legislation to efface; though the steps of that improvement have been cautious and progressive. To do justice to the subject, it will be necessary to refer briefly to the several reformatory provisions, or such of them as are of principal importance; but any extended notice of the former state of the law will not be requisite; as the very statement of these provisions will in general suffice to explain, at the same time, the

(*t*) See R. *v.* Crighton, R. & R. C. C. R. 62. So also it is essential to state in an indictment for larceny, who was the *owner* of the article stolen. See Sill's case, 1 Dearsley's C. C. R. 132.

(*u*) See R. *v.* Jukes, 8 T. R. 536.

nature of the formal grievances and abuses which it is their object to extirpate.

To pursue then the order that we adopted when the several offences themselves were under consideration, our enumeration of the modern enactments as to the mode in which the offence is to be charged, may be as follows.

By 14 & 15 Vict. c. 100, s. 4, it shall not be necessary in any indictment for murder or manslaughter, to set forth the manner in which, or the means by which, the death was caused: but in murder, it shall be sufficient to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; and, in manslaughter, to charge that the defendant did feloniously kill and slay the deceased (*v*).

By 14 & 15 Vict. c. 19, s. 5, if, on an indictment for any felony, except murder and manslaughter, the indictment shall allege that the defendant did cut, stab, or wound any person; and the jury shall be satisfied that he is guilty of the cutting, stabbing, or wounding, but, not satisfied that he is guilty of the felony,—he may be acquitted of the felony, and convicted of the cutting, stabbing, or wounding, and punished as if he had been indicted for that offence (*x*).

By 14 & 15 Vict. c. 19, s. 2, in any indictment for burglarious misdemeanor under that Act, committed after a previous conviction for felony or such burglarious misdemeanor, it shall be sufficient to state that the offender was at a certain time and place convicted of felony or misdemeanor, against "The Act for the better Prevention of Offences, 1851," without otherwise describing the previous felony or misdemeanor (*y*).

By 11 & 12 Vict. c. 46, s. 3, in every indictment for feloniously stealing property, it shall be lawful to add a

(*v*) As to murder and manslaughter, vide sup. pp. 134, 137.

(*x*) As to stabbing, cutting and wounding, vide sup. p. 150.

(*y*) As to burglarious attempts, vide sup. p. 180.

count for feloniously receiving the same property knowing it to have been stolen; and in any indictment for feloniously receiving property knowing it to have been stolen, to add a count for feloniously stealing the same property; and where any such indictment shall have been found, the prosecutor shall not be put to his election, but the jury may find a verdict of guilty upon either count: and where such indictment shall be found against two or more persons, the jury may find all or any guilty upon either count; or one or more guilty on one count, and the other or others on the other count (z).

By 14 & 15 Vict. c. 100, s. 16, it shall be lawful to insert several counts in the same indictment against the same person, for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person, within six calendar months from the first to the last of such acts; and to proceed thereon for all or any of them (a).

And by sect. 17, if, upon the trial of any indictment for larceny, it shall appear that the property alleged to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; but, in either of these cases, he shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within such period of six calendar months.

By the same Act, sect. 11, if, on an indictment for robbery, it shall appear to the jury that the defendant did not commit robbery, but that he did commit an assault with intent to rob, he shall not be thereby entitled to be acquitted: but the jury shall be at liberty to find him guilty

(z) As to larceny, vide sup. p. 181.

(a) As to *counts*, vide sup. vol. III. p. 579.

of such assault, and he shall be punished as if he had been indicted for an offence of that description (*b*).

By 12 & 13 Vict. c. 11, s. 4, in any indictment against a person who has been twice convicted of offences punishable on summary conviction, under 7 & 8 Geo. IV. c. 30; 9 Geo. IV. c. 56; 10 & 11 Vict. c. 82; or 11 & 12 Vict. c. 59, —and who shall afterwards commit the offence of simple larceny, or any offence by the last two Acts made punishable like simple larceny,—it shall be sufficient to state that he was at certain times and places so twice convicted as aforesaid, without otherwise describing the offence of which he was so convicted.

By 12 & 13 Vict. c. 103, s. 15, in an indictment or other criminal proceeding against any collector or assistant overseer appointed by the Poor-law board for embezzlement or theft of the parish money or property,—he shall be deemed and taken to be the servant of the inhabitants of the parish, and shall be so described; and it shall be sufficient to state any such money or property to belong to the inhabitants of such parish, without the names of any such inhabitants being specified.

By 14 & 15 Vict. c. 100, s. 13 (*c*), if, upon the trial of any person indicted for *embezzlement* as a clerk or servant, or person employed for that purpose, or in the capacity of a clerk or servant, it shall be proved that he took the property in any such manner as to amount in law to *larceny*, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to find that he is not guilty of the embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant or person employed for the purpose, or in the capacity of a clerk or servant, as the case may be; and he shall be liable to be punished as if he had been indicted for such larceny; and *vice versâ*, if upon the trial of any person indicted for larceny, it shall

(*b*). As to robbery, vide sup. p. 194.

(*c*) See also 20 & 21 Vict. c. 54, s. 14, as to the case of a trial under that Act.

be proved that he took the property in any such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury may find that he is not guilty of larceny, but is guilty of embezzlement; and he shall be liable to be punished as if he had been indicted for such embezzlement (*e*).

By 14 & 15 Vict. c. 100, s. 18, it is enacted, that in cases of embezzlement and obtaining money by false pretences (*f*), the indictment shall be sustained by proof that the offender embezzled or obtained any piece of coin, or any bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or any other person, and should have been returned accordingly.

By 11 & 12 Vict. c. 88, s. 5, in any indictment for felony or misdemeanor with respect to the Post Office, it shall be sufficient to lay the property in, and state the same to belong to, and the act to have been committed with intent to injure or defraud, "Her Majesty's Postmaster-General;" and in all indictments concerning the department of the Post Office, the postmaster-general may be so described without further name or description (*g*).

By 14 & 15 Vict. c. 100, s. 14, if upon the trial of two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part of such property, it shall be lawful for the jury to convict upon such indictment such of the persons as shall be proved so to have received the same.

And by sect. 15, reciting "that it frequently happens that the principal in a felony is not in custody or amenable to justice, although several accessories to such felony,—or receivers at different times of stolen property, the subject of such felony,—may be in custody or amenable to jus-

(*e*) As to embezzlement, vide sup. p. 199.

(*f*) As to obtaining money under false pretences, vide sup. p. 217.

(*g*) As to larcenies in relation to the Post Office, vide sup. p. 204.

tice," it is, "for prevention of several trials," enacted, that any number of such accessories or receivers may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice (*h*).

By 14 & 15 Vict. c. 100, ss. 5, 6, 7, in any indictment for forging, uttering, stealing, embezzling, destroying or concealing, or obtaining by false pretences, or engraving any instrument,—or for having unlawful possession of the plate or paper, or in making any averment as to any instrument whatever, in writing, print or figures;—it shall be sufficient to describe such instrument by any name or description by which it is usually known, without setting forth any copy or fac-simile (*i*).

And by sect. 8, in any indictment for forging or uttering any instrument, or obtaining or attempting to obtain any property by false pretences, it shall be sufficient to allege that the defendant did the act with intent to defraud, without alleging an intent to defraud any particular person; and, on the trial it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the defendant did the act with an intent to defraud (*k*).

By 11 & 12 Vict. c. 12, for the better security of the Crown and government of the united kingdom, it is provided (sect. 5), that in any indictment for felony under that Act, it shall be lawful to charge against the offender any number of the matters, acts or deeds by which the compassings, imaginations, inventions, devices or intentions made felonious by that Act, or any of them, shall have been expressed, uttered or declared (*l*).

By 14 & 15 Vict. c. 100, s. 20, in any indictment for perjury, it shall be sufficient to set forth the substance of

(*h*) As to accessories and receivers generally, vide sup. p. 110.

(*i*) As to forgery, &c. vide sup. p. 213.

(*k*) Ibid.

(*l*) Vide sup. p. 236.

the offence charged upon the defendant, and by what court or before whom the oath, or affirmation, or writing was taken or made or subscribed,—without setting forth the proceeding in law or equity, or any part of the proceedings in the course of which such offence was committed, and without setting forth the commission or authority of the court or person before whom it was committed (*m*).

And by sect. 21, that in every indictment for subornation of perjury it shall be sufficient, wherever such perjury shall have been actually committed, to allege the offence of the person who committed it in such manner as would be sufficient in an indictment against such person (*n*), and then to allege that the defendant unlawfully, wilfully and corruptly did cause and procure the said person the said offence in manner and form aforesaid to do and commit; and wherever such perjury shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things thereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.

Besides all these, there are other provisions of a more general kind. For

By 9 Geo. IV. c. 15, all judges at nisi prius, or at any court of oyer and terminer and gaol delivery, are empowered to amend the record upon which any trial may be pending in any indictment or information for any misdemeanor, when any *variance* shall appear between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof on the record. And by 11 & 12 Vict. c. 46, s. 4, it shall be lawful for any court of oyer and terminer and gaol delivery, if such court shall see fit so to do, to cause the indictment or information for any offence what-

(*m*) As to perjury and subornation of perjury, vide sup. pp. 307, 308.

(*n*) The Act has the words "in the manner hereinbefore mentioned," which seem to have the meaning above assigned to them.

ever,—when any *variance* shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending,—to be forthwith amended in such particular or particulars by some officer of the court. And, lastly, by 14 & 15 Vict. c. 100, s. 1 (*o*), whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be a variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place; or in the name or description of any person or persons, or body politic or corporate, therein alleged to be the owner or owners of any property (real or personal) which shall form the subject of any offence charged therein, or therein alleged to be injured or damaged or intended to be injured or damaged, by such offence; or in the christian name or surname, or other description whatsoever of any person or persons therein named or described; or in the name or description of any matter or thing whatsoever therein named or described; or in the ownership of any property named or described therein:—it shall be lawful for the court before which the trial shall be had, in any of the above cases, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order the indictment to be amended, according to the proof, by some officer of the court or other person; on such terms as to postponing the trial, to be had before the same or another jury, as the court shall think reasonable.

By 14 & 15 Vict. c. 100, s. 9, if on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury that the defendant did not complete the offence, but was guilty only of an attempt to commit the same, he shall not by reason thereof be entitled to be acquitted, but

(*o*) As to the effect of this section, see Sill's case, 1 Dearsley's C. C. R. 132.

the jury may find that he is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and he shall be punished in the same manner as if he had been indicted for the attempt.

By 14 & 15 Vict. c. 100, s. 12, if upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, he shall not by reason thereof be entitled to be acquitted of the misdemeanor (*o*): and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court shall think fit to discharge the jury from giving any verdict, and direct such person to be indicted for felony, in which case he shall be dealt with in all respects as if he had not been put on his trial for the misdemeanor.

By sect. 18, in every indictment in which it shall be necessary to make averment as to any money, or note of the Bank of England or other bank, it shall be sufficient to describe such money or bank note, simply as *money*, without specifying any particular coin or bank note; and such allegation, as far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved.

By sect. 24, no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record;" or the words "with force and arms;" or the words "against the peace;" nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versâ;* nor for that any person is designated by a name of office or other descriptive appellation, instead of his proper name; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time im-

(*o*) See also 20 & 21 Vict. c. 54, s. 14, as to the case of a trial under this Act.

perfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue; nor for want of a proper or formal conclusion; nor for want of or imperfection in the addition of any defendant; nor for the want of the statement of the value or price of any matter or thing; or the amount of damages, injury or spoil, in any case where the value or price, or the amount of damage, injury or spoil, is not of the essence of the offence (*p*).

Lastly, by 19 & 20 Vict. c. 16, s. 17, it shall not be necessary for any purpose whatsoever, to prove that any indictment or inquisition for any offence committed, or supposed to have been committed, out of the jurisdiction of the Central Criminal Court, has been duly removed into the Court of Queen's Bench, or duly transmitted or removed into the Central Criminal Court, under the provisions of that Act; but every such indictment shall be presumed to have been duly removed, or duly removed and transmitted, upon production of the same in the Central Criminal Court, by the proper officer having custody of the records of the Central Criminal Court; and no evidence or proof to the contrary shall be admitted.

III. The remaining method of prosecution to which we formerly referred (*q*), is that which dispenses with any previous finding by a jury [to fix the authoritative stamp of verisimilitude upon the accusation.] An instance of this, by the common law, [was when a thief was taken *with the mainour*, that is, with the thing stolen upon him *in manu*. For he might, when so detected *flagrante delicto*, be brought into court, arraigned, and tried, without indict-

(*p*) The statute of 14 & 15 Vict. c. 100, includes under the word *indictment*,—an *information, inquisition, presentment*; and also any *plea, replication*, and other *pleading*; and any *nisi prius record*. (Sect. 36.) As to the practice and amendments under this statute, see Frost's case, 1 Dearsley's C. C. R. 474.

(*q*) Vide sup. p. 421.

[ment; as, by the Danish law, he might be taken and hanged upon the spot, without accusation or trial. But this proceeding was taken away by several statutes in the reign of Edward the third;] so that the only species of regular prosecution, without a previous indictment or presentment by a grand jury, now seems to be that of information.

The term *Information* is variously applied in our law. We understand by it, either a charge on oath, laid before a justice or justices of the peace with a view to a summary conviction, and of which we have already had occasion to speak; or a complaint exhibited by a common informer in one of the superior courts of law, to recover a penalty, which some penal statute has made recoverable, by him who shall first sue, or inform, for the same in those courts; and that either on his own behalf or (more usually) on behalf of himself and the Crown jointly;—or lastly, a complaint exhibited in the name of the Crown itself in the Court of Exchequer, or the Court of Chancery, in respect of a civil claim on the part of the Crown; or in the Court of Queen's Bench, in respect of any offence under the degree of treason or other felony. It is to informations of the latter species only, that our attention is to be at present directed; all the other species having been sufficiently noticed in the course of the present work under their appropriate heads (*r*).

[The informations that are exhibited in the name of the sovereign] in criminal cases, [are of two kinds; first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney-general: secondly, those in which, though the Crown is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by

(*r*) Vide sup. p. 398, as to informations before justices of the peace; pp. 54, 70, as to informations in Chancery and the Exchequer; and vol. III. p. 526, as to *qui tam* penal actions, which are substantially the same with informations *qui tam*. (See 2 Hawk. P. C. c. 20, 26.)

[the sovereign's coroner and attorney, usually called "the Master of the Crown Office," (who is for this purpose the standing officer of the public (*s*),) in the Court of Queen's Bench.

The object of the sovereign's own prosecutions, filed *ex officio* by his own attorney-general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal: which power, thus necessary not only to the ease and safety, but even to the very existence of the executive government, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations, filed by the master of the Crown Office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels and other immoralities of an atrocious kind (*t*), not peculiarly tending to disturb the government, (for those are left to the care of the attorney-general,) but which, on account of their magnitude or pernicious example, deserve the most public animadversion.] In such cases as these the course is for the party grieved to move the Court of Queen's Bench for a rule to show cause why a criminal information should not be filed; which motion, in case of libel, must be supported by an affidavit

(*s*) See R. *v.* Smithson, 4 B. &. Ad. 861; R. *v.* Eve, 5 Ad. & El. 780; R. *v.* Larrieu, 7 A. & E. 277. One species of such information is that in the nature of a writ of *quo warranto*, to which we had occasion to refer in a former volume. Vide sup. vol. III. p. 706.

(*t*) Hawk. P. C. b. 2, c. 26, s. 1. A person who applies for and obtains a criminal information, is thereby concluded from bringing an action in respect of the same grievance. (See R. *v.* Sparrow, 2 T. R. 198, Hil. 1788; Walker *v.* Cooke, 16 M. & W. 344.)

expressly denying the truth of the imputation (*u*). This rule is served on the defendant according to the ordinary course of practice on motions (*x*), and, if no sufficient cause is shown, is made absolute, and an information filed accordingly. [And when an information is filed, either thus, or by the attorney-general *ex officio*, it must be tried by a petit jury of the county where the offence arises;] and for that purpose, unless the case be of such importance as to be tried at bar (*y*), it is sent down by writ of *nisi prius* into that county; and tried either by a common or special jury, like a civil action.

[There can be no doubt but that this mode of prosecution by information (or suggestion) filed on record by the attorney-general, or by the master of the Crown Office, is as antient as the common law itself. For, as the sovereign was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit: so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the Court of King's Bench by a suggestion on record, and to carry on the prosecution in the name of the Crown. But these informations (of every kind) are confined, by the constitutional law, to mere misdemeanors only: for whereever any] felonious (*z*) offence [is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. And, as to those offences in which informations were

(*u*) As to motions, vide sup. vol. III. p. 694.

(*x*) R. *v.* Wright, 2 Chit. Rep. 162.

(*y*) Vide sup., vol. III. p. 588.

(*z*) "Any *capital* offence" is the expression of Blackstone, 4 Bl. Com. p. 310; et vide 2 Hale, P. C. 151. But the doctrine extends to felonies generally, whether capital or not. Com. Dig. "Information," A. 1; 1 Chit. C. L. 844.

[allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the statute 3 Henry VII. c. 1, had extended the jurisdiction of the court of Star-Chamber, the members of which were the sole judges of the law, the fact, and the penalty; and when the statute of 11 Henry VII. c. 3, had permitted informations to be brought by any informer upon any penal statute, (not extending to life or member,) at the assizes, or before the justices of the peace, who were to hear or determine the same according to their own discretion; then it was that the legal and orderly jurisdiction of the Court of King's Bench fell into disuse and oblivion; and Empson and Dudley, (the wicked instruments of King Henry the seventh,) by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices (*a*), continually harassed the subject, and shamefully enriched the Crown. The latter of these Acts was soon, indeed, repealed by statute 1 Henry VIII. c. 6; but the Court of Star-Chamber continued in high vigour, and daily increasing its authority, for more than a century longer, till finally abolished by statute 16 Car. I. c. 10.

Upon this dissolution the old common law (*b*) authority of the Court of King's Bench, as the *custos morum* of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice (*c*). And it is observable, that in the same Act of Parliament which abolished the court of Star-

(*a*) 1 And. 157.

(*b*) Prynn's case, 5 Mod. 464.

(*c*) Styl. Rep. 217, 245; Styl. Pract. tit. "Information," p. 187, (edit. 1657); Fountain's case, 1 Sid. 152; Dudley's case, 2 Sid. 71.

[Chamber, a conviction by information is expressly reckoned up as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute (*d*). It is true, Sir Matthew Hale, who presided in this court soon after the time of such revival, is said to have been no friend to this method of prosecution (*e*), and if so, the reason of such his dislike was probably the ill use which the master of the Crown Office then made of his authority, by permitting the subject to be harassed with vexatious informations whenever applied to by any malicious or revengeful prosecutor; rather than his doubt of their legality, or propriety upon urgent occasions (*f*).. For the power of filing informations, without any control, then resided in the breast of the master; and, being filed in the name of the Crown, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them in the time preceding the Revolution, occasioned a struggle, soon after the accession of King William (*g*), to procure a declaration of their illegality by the judgment of the Court of King's Bench. But Sir John Holt, who then presided there, and all the judges, were clearly of opinion that this proceeding was grounded on the common law, and could not be then impeached. And in a few years afterwards a more temperate remedy was applied in parliament, by statute 4 & 5 W. & M. c. 18, which enacts, that the clerk of the Crown shall not file any information without express direction from the Court of King's Bench; and that every prosecutor permitted to promote such information, shall give security by a recognizance of twenty pounds to prosecute the same with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the judge who tries the information shall certify that there was rea-

(*d*) Stat. 16 Car. 1, c. 10, s. 6.

(*e*) Prynn's case, 5 Mod. 460.

(*f*) 1 Saund. 301; R. *v.* Starling, 1 Sid. 174.

(*g*) M. 1 W. & M., Prynn's case, ubi sup.; Comb. 141; Far. 361; R. *v.* Berchet, 1 Show. 106.

[sonable cause for filing it; and, at all events, to pay costs unless the information shall be tried within a year after issue joined (*h*). But there is a proviso in this Act, that it shall not extend to any other informations than those which are exhibited by the master of the Crown Office; and consequently informations at the suit of the Crown, filed by the attorney-general, are nowise restrained thereby.]

Besides these methods of prosecution, there formerly existed another, which was merely at the suit of the subject, and called an *appeal*, demanding punishment on account of the private injury rather than the public offence. This proceeding, though leading, in case of conviction, to the same punishment as if the offender had been indicted, might yet be remitted by the private prosecutor; and probably originated, says Blackstone (*i*), in those times [when a private pecuniary satisfaction, called a *weregild* (*k*), was constantly paid to the party injured, or his relations, to expiate enormous offences: a custom derived to us, in common with other northern nations, from our ancestors, the antient Germans: among whom, according to Tacitus, "*luitur homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus* (*l*)."] Appeals were allowed in murder, larceny, rape, arson and mayhem (*m*).

(*h*) As to the costs of an informations for a libel, see Reg. *v.* Latimer, 20 L. J (N. S.) Q. B. 129.

(*i*) 4 Bl. Com. 313.

(*k*) In our Saxon laws, particularly those of Athelstan, (Judic. Civ. Lund. Wilk. 71,) we find the several weregilds for homicide established in progressive order, from the death of the ceorl or peasant to that of the king himself. Et vide Leges Hen. 1, c. 12.

(*l*) De Mor. Germ. c. 21. And in another place, c. 12: "*Delictis, pro modo pœnarum, equorum pecorumque numero convicti mulctantur. Pars mulctæ regi vel civitati; pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur.*" In the same manner, by the Irish Brehon law, in case of murder, the Brehon, or judge, was used to compound between the murderer and the friends of the deceased, by causing the former to give a recompence. Spenser, St. of Ireland, p. 1513 (edit. Hughes). And so in Turkey we are told, that murder is generally compounded for by a pecuniary payment to the next relations. Lady M. W. Montagu, Lett. 42.

(*m*) 4 Bl. Com. p. 314. Of the appeal in case of murder, we may remark, that it might be brought either by the wife for the death of her hus-

They were not however confined to these cases of private injury, [for it was also antiently permitted to any subject to appeal another subject of high treason, either in the courts of common law or in parliament; or, (for treasons committed beyond the seas,) in the court of the high constable and marshal (*n*).] But these appeals for treason were, in the opinion of Sir M. Hale (*o*), taken away by 5 Edward III. c. 9; 25 Edward III. c. 4; and 1 Henry IV. c. 14. And though the remaining appeals continued in force till our own day (*p*), yet now, by 59 Geo. III. c. 46, it is enacted, that it shall thenceforth not be lawful for any person to sue an appeal for treason, murder, felony, or other offence; any law or usage to the contrary notwithstanding.

An indictment and an information, therefore, are the only methods now extant in the laws of England, for the punishment of offences; of which that by indictment is the most general. [We shall therefore confine our subsequent observations principally to this method; but with some reference, also, as occasion may arise, to the course of proceeding by information.]

band, or by the heir male within four degrees of blood, for the death of his ancestor. (Ibid.)

(*n*) As late as 1631 there was a trial by battel awarded in the court of chivalry, on an appeal of treason beyond the seas. Donald Lord Rea *v.* David Ramsey, Rushw. vol. ii. part ii. p. 112.

(*o*) 1 Hale, P. C. 349.

(*p*) See Abraham Thornton's case, 1 B. & Ald. 405.

CHAPTER XIX.

OF PROCESS UPON AN INDICTMENT: AND HEREIN OF CERTIORARI.

[We are next, in the fourth place, to inquire into the manner of issuing process, after indictment found, to bring in the accused to answer it (*a*). We have hitherto supposed the offender to be in custody before the finding of the indictment; in which case he is immediately, or as soon as convenience permits, to be arraigned thereon. But if he has fled or secretes himself,] so as to avoid the operation of the warrant; or if no warrant has ever been issued for his arrest, or if no commitment, at least, has taken place;—[still an indictment may be preferred against him in his absence: since, were he present, he could not be heard before the grand jury against it. And if it be found, then process must issue to bring him into court,] to appear, or be arraigned. [For the indictment cannot be tried unless he appears,] according to the rule of justice in all cases, [and the express provision of statute 28 Edw. III. c. 3, in capital ones, that no man shall be put to death without being brought to answer by due process of law.]

In general, the process on an indictment is by writ of *capias* (*b*), where the person charged is not in custody, and in cases not otherwise provided for by statute. In misdemeanors it is, also, the practice upon an indictment found during the assizes or sessions, to issue a *bench warrant*,

(*a*) As to the term *process*, vide sup. vol. III. p. 558.

(*b*) 25 Edw. 3, c. 14; 2 Hale, P. C. 195; R. *v.* Yandell, 4 T. R. 521; 1 Chit. Cr. 339.

signed by a judge or two justices of the peace, to apprehend the defendant (*c*). And whenever any person is charged with any offence, (not being treason or felony,) for which he may be prosecuted by indictment, or by information, in the Court of Queen's Bench;—and it shall be made to appear to any judge of the same court, by affidavit or by certificate, that an indictment has been found, or information filed, in such court, against the party, for such offence;—it shall be lawful for the judge to issue his warrant to bring the party before him, in order to his being bound, with sufficient sureties, to appear and answer the indictment or information (*d*). But process on any indictment found, may now also, under the provisions of a modern statute, be by warrant from justices of the peace, instead of suing out a *capias* or proceeding under the provisions above referred to: for by 11 & 12 Vict. c. 42, s. 3, it is enacted, that where an indictment shall have been found for any indictable offence, in any court of oyer and terminer, or general gaol delivery, or general or quarter sessions of the peace, against any person then at large,—a certificate shall be granted by the proper officer to the prosecutor, of such indictment having been found; and upon production of such certificate to any justice, or justices, of the peace for the place where the offence is alleged in the indictment to have been committed, or in which the person indicted is or is suspected to be, such justice or justices shall issue a warrant to apprehend such person, and cause him to be brought up to be dealt with according to law; and, upon its being proved that he is the same person as named in the indictment, shall, without further inquiry, commit him for trial, or admit him to bail. Or if the person against whom the indictment is found, shall be confined in any gaol or prison for any other offence,—then, upon its being proved that he is the same person as named in the

(*c*) 1 Chit. Cr. L. 339.

(*d*) 48 Geo. 3, c. 58, s. 1.

indictment, they shall issue their warrant to the gaoler, commanding him to detain such person in his custody, until by writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the indictment, or be otherwise discharged by due course of law (*e*).

Supposing, however, the defendant not to be found, so that his apprehension cannot be effected by *capias*, or bench warrant, or warrant of a magistrate,—he is still liable, on his non-appearance to the indictment, to be *outlawed* (*f*). The first process for this purpose, in case of misdemeanor, is by [a writ of *venire facias*, which is in the nature of a summons, to cause the party to appear; and if by the return to such *venire*, it appears that the party hath lands in the county whereby he may be distrained, then a distress infinite shall be issued from time to time till he appears. ' But if the sheriff returns that he has no lands in his bailiwick, then, upon his non-appearance, a writ of *capias* shall issue; and if he cannot be taken upon the first, a second and a third shall issue, called an *alias* and a *pluries capias*.] But on indictments for treason and felony, the course is more summary, and a *capias* is the first process. [After the several writs have issued in a regular number,—according to the nature of the respective crimes,—without any effect, the offender shall be put in the *exigent*, in order to his outlawry; that is, he shall be exacted (proclaimed, or required to surrender), at five county courts;] and a writ of proclamation shall also be

(*e*) In the particular case of a prisoner, ordered by the Queen's Bench to be tried at the Central Criminal Court, under the provisions of 19 & 20 Vict. c. 16, the gaoler is, by sect. 5 of that Act, to cause the prisoner, with his commitment and detainer, to be removed to Newgate without an *habeas corpus* or other writ.

(*f*) Outlawry does not lie against a corporation, or a parish, or a hundred; nor against a peer, except for treason, felony, or breach of the peace; nor against an infant under fourteen. (1 Chit. Cr. L. 348.) In case of outlawry of a woman, she is said to be *waived*.

issued (*g*): [and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law: so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise,] and his property is forfeited to the Crown (*h*). [An outlawry for treason or felony, amounts to a conviction and attainder of the offence as much as if the offender had been found guilty by his country (*i*). His life is, however, still under the protection of the law, so that though antiently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head, like a wolf, by any one that should meet him (*k*);—because having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him;—yet now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in so doing is guilty of murder (*l*), unless it happens in the endeavour to apprehend him (*m*): for any person may arrest an outlaw on a criminal prosecution,—either of his own head, or by writ or warrant of *capias utlagatum*,—in order] to bring him in to be dealt with according to law. But an outlawry may be frequently reversed by plea, or by proceedings in error (*n*), according to the nature of the case. In the case of felony, however, the defendant must for this purpose render himself into custody (*o*); and may then take

(*g*) 4 & 5 W. & M. c. 22, made perpetual by 7 & 8 Will. 3, c. 36, s. 4.

(*h*) A defendant in a civil action is also liable, after judgment, to be outlawed, supposing him to abscond leaving the judgment debt unpaid; but the proceeding in civil cases, owing to the greater efficacy now given to the writs of execution against property, is not so usual as it was formerly.

(*i*) 2 Hale, P. C. 205.

(*k*) Mirr. c. 4, s. 4; Co. Litt. 128.

(*l*) 1 Hale, P. C. 497.

(*m*) Bracton, l. 3, tr. 3, c. 11.

(*n*) See a modern case of reversal of outlawry on error, after the lapse of 116 years, for want of due proclamations having been made, Tynte *v.* Reginam, 7 Q. B. 216.

(*o*) See Solomon *v.* Graham, 5 Ell. & Bl. 320, per Lord Campbell.

any technical objection to the regularity of the process; which, if allowed, will have the effect of reversing the outlawry, and enable the party accused to plead and defend himself against the indictment (*p*). In one instance, indeed, though the outlawry be regular, its consequences may be avoided: for by 5 & 6 Edw. VI. c. 11, (which permits outlawry for treason, to be awarded against persons residing abroad,)—if a person so outlawed shall, within one year, yield himself to the chief justice, and offer to traverse the indictment, he shall be admitted so to do; and, being acquitted of the indictment, shall be discharged of the outlawry.

[Thus much for process to bring in the offender after indictment found; during which stage of the prosecution it is, that writs of *certiorari facias* (*q*) are usually had, though they may be had at any time before trial;]—or, as it seems, at any time before judgment is given, and even afterwards, where error does not lie (*r*);—[to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction, into the Court of Queen's Bench. Which is the sovereign ordinary court of justice in causes criminal;] and has consequently the power of issuing this writ to any court of rank subordinate to its own in causes of this description, unless the *certiorari* be taken away by the express words of some Act of Parliament (*s*). A *certiorari* is frequently granted [for one of these four purposes: either, 1, to consider and determine the validity of indictments, and the proceedings thereon, and to quash or confirm them as there is cause; or, 2, where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed in order to have the person against whom it is found tried at the bar of the Queen's Bench or before the justices of *nisi*

(*p*) Chit. Cr. L. 368, 369; 4 Bl. Com. 320.

(*q*) As to *certiorari* in civil proceedings, vide sup. vol. III. pp. 721, 722.

(*r*) 1 Chit. Cr. L. 380.

(*s*) Vide sup. p. 372, et post, p. 453.

[*prius;* or, 3, it is so removed in order to plead the royal pardon there; or, 4, to issue process of outlawry against the offender, in those counties or places where the process of the inferior courts will not reach him (*u*). Such writ of *certiorari*, when issued and delivered to the inferior court, for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court; and makes all subsequent proceedings therein entirely erroneous and illegal,] (unless the Court of Queen's Bench remands the record to the court below, to be there tried and determined); and the trial of the indictment, after removal thereof by *certiorari*, is either at the *bar* of the Court of Queen's Bench (*x*) or at *nisi prius*, according to the course in a civil action (*y*). [A *certiorari* may be granted at the instance of either the prosecutor or the defendant;] and the former was once entitled to demand it as a matter of right, though the application of the latter has always been dependent on the discretion of the court (*z*). But now, by 5 & 6 Will. IV. c. 33, and 16 & 17 Vict. c. 30, s. 5, no *certiorari* shall issue at the instance of the prosecutor, or of any other person (except the attorney-general), without motion first made in the Court of Queen's Bench, or before some judge of that court, and leave obtained, in the same manner as where application is made on the part of the defendant: and moreover, before

(*u*) 2 Hale, P. C. 210.

(*x*) Vide post, pp. 453, 454, as to the trial being, in certain cases, ordered to take place at the Central Criminal Court.

(*y*) 14 Hen. 6, c. 1; 6 Hen. 8, c. 6; 4 Rep. 43; 2 Hale, P. C. 41. By 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, the judgment in such cases may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken; and the judgment shall be indorsed on the record, and afterwards entered on the record in court; and it shall be lawful for the judge either to issue an immediate order for execution, or to respite the execution, &c.

(*z*) 4 Bl. Com. 321. In the exercise of this discretion, a *certiorari* has been seldom granted to remove indictments from the justices of gaol delivery; or after issue found, or confession of the fact, in any of the courts below. Hawk. P. C. b. 2, c. 27, s. 27; R. *v.* Gwynne, Burr. 749; R. *v.* Kingston, Cowp. 283; R. *v.* Harrison, 1 Chit. Rep. 571.

the allowance of any writ of *certiorari*, the party on whose behalf it is applied for, must enter into a recognizance before a judge of the Queen's Bench or justice of the peace, in such sum and with such sureties as the court or a judge may direct, and with such conditions as are contained in the previous statutes 5 & 6 W. & M. c. 11, and 8 & 9 Will. III. c. 33, passed in relation to the same subject (*a*). And by 16 & 17 Vict. c. 30, s. 4, reciting that by reason of the establishment of a court of criminal appeal, the removal of indictments by writ of *certiorari* is seldom necessary for the decision of questions of law, it is enacted, that no indictments, except against bodies corporate, not authorized to appear by attorney in the court in which the indictment is preferred, shall be removed into the Court of Queen's Bench, or into the Central Criminal Court by *certiorari*, either at the instance of the prosecutor or of the defendant, (other than the attorney-general acting on behalf of the Crown,)—unless it be made to appear to the court from which the writ is to issue; by the party applying for the same, that a fair and impartial trial of the case cannot be had in the court below; or that some question of law of more than usual difficulty and importance is likely to arise upon the trial; or that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for the satisfactory trial of the same.

The recent Act (19 & 20 Vict. c. 16) with regard to the trial of offences committed or supposed to have been committed out of the jurisdiction of the Central Criminal Court, the indictment or inquisition for which has been removed by *certiorari* into the Court of Queen's Bench, contains

(*a*) By 5 & 6 Will. 4, c. 33, a recognizance was required only where the writ was obtained on the part of the defendant. But by 16 & 17 Vict. c. 30, s. 5, it is also required from the prosecutor; and this last statute provides, moreover, for the payment of the costs incurred subsequent to the removal, either by the defendant or the prosecutor, according to the ultimat issue of the proceedings.

provisions, of which some notice is proper in this place. 1. Whenever any such indictment or inquisition has been so removed, the Court of Queen's Bench or a judge thereof in vacation is empowered to order the trial thereof to be at the Central Criminal Court, if it shall appear expedient to the ends of justice that such course should be taken (*b*). 2. Wherever any person shall have been committed or held to bail for any such offence, the Court of Queen's Bench, or judge in vacation, if it shall appear expedient to the ends of justice that the person charged should be tried at the Central Criminal Court, may make an order to that effect; and thereupon a writ of *certiorari* shall be issued to the justices of oyer and terminer, or of the peace, or coroner, (as the case may require,) commanding them to certify and return thither the indictment or inquisition (*c*). 3. Wherever any *certiorari* shall be delivered to any court for the purpose of removing any indictment or inquisition therefrom, any person charged by such indictment or inquisition who shall then be in prison, shall not be discharged by such court, but shall remain there till discharged by due course of law (*d*).

[At this stage of the proceeding also—viz., after indictment found, and before arraignment—it is, that indictments found by the grand jury against a peer must, in consequence of a writ of *certiorari*, be certified and transmitted into the court of parliament, or into that of the lord high

(*b*) 19 & 20 Vict. c. 16, s. 1. By sect. 2, on notice of such order, the indictment or inquisition is to be transmitted, by the proper officer of the Queen's Bench, to the proper officer of the Central Criminal Court.

(*c*) Sect. 3. By sect. 4, the justice, coroner, clerk of the peace or of assize, or other person having the custody of the indictment or inquisition, is to transmit any recognizances, depositions, examinations, or informations relating to the offence charged, which shall be in his possession, to the proper officer of the Central Criminal Court.

(*d*) Sect. 11. See ss. 8, 9, 10, as to the recognizances required; (in cases of orders made, or writs of certiorari issued under this Act,) from the person charged, or the prosecutor, or witnesses, to take their trial, prosecute or give evidence, (as the case may require,) at the Central Criminal Court.

[steward of Great Britain (e); and that in places of exclusive jurisdiction, as the two universities, indictments must be delivered up, on challenge and claim of conusance, to the courts therein established by charter, and confirmed by Act of Parliament, to be therein respectively tried and determined (f).]

Of process upon informations, not much requires to be said. In general the course of proceeding is similar to that upon indictments: but the first process is by writ of *subpœna* instead of *venire*; and if the defendant does not appear on this, a *capias* is awarded (g). Supposing it to be necessary, however, to proceed to outlawry, the first process is by *venire facias*, as in the case of an outlawry upon an indictment for a misdemeanor, and not by *subpœna* (h).

(e) Vide sup. pp. 364, 367. It may be observed, that by sect. 29 of 19 & 20 Vict. c. 16, this privilege of the peerage is recognized and confirmed,—it being enacted that nothing in that Act contained shall be deemed to apply to any indictment or inquisition charging any peer or peeress, or other person claiming the privilege of peerage, with any offence not now lawfully triable by any court of oyer and terminer and gaol delivery for any county.

(f) Vide sup. p. 390.

(g) 1 Chit. Cr. L. 865.

(h) Ibid. 866.

CHAPTER XX.

OF ARRAIGNMENT AND ITS INCIDENTS.

THE appearance of the offender, (enforced by the methods pointed out in the last chapter, unless he appears voluntarily, or is already in custody,) must, in general, be in *person*. But in indictments or informations in the Court of Queen's Bench, for misdemeanors, an appearance *by attorney* is allowed (*a*). And in misdemeanors generally, wherever the proceedings are instituted, the trial of the defendant, after he has once appeared, is permitted to take place in his absence (*b*). Immediately on the appearance to an indictment, the offender is to be [*arraigned* thereon; which we have considered as the fifth stage of criminal prosecution.

To arraign is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment (*c*). The prisoner is to be called to the bar by his name; and it is laid down in our antient books (*d*), that though, under an indictment of the highest

(*a*) By 19 & 20 Vict. c. 16, s. 6, it is provided that on application to the Queen's Bench for an order, that a person charged with any offence committed, or supposed to be committed, out of the jurisdiction of the Central Criminal Court, shall nevertheless be there tried, —it shall not be necessary for such person to be brought or appear in person before the Court of Queen's Bench or judge to whom the application is made.

(*b*) 4 Bl. Com. 375; 1 Chit. Cr. L. 411.

(*c*) This word in Latin (says Sir M. Hale, vol. ii. p. 216) is no other than *ad rationem ponere*, (and in French *ad reson*, or abbreviated *a resn*,) that is, to call to account.

(*d*) Bract. l. 3, De Coron. c. 18, s. 3; Mirr. c. 5, ss. 1, 54; Flet. l. 1, c. 21, s. 1; Brit. c. 5; Staundf. P. C. 78; 3 Inst. 34; Kel. 10; 2 Hale, P. C. 219; Hawk. P. C. b. 2, c. 28, s. 1.

[nature, he must be brought to the bar without irons, or any manner of shackles or bonds: unless there be evident danger of an escape, and then he may be secured with irons. But yet in Layer's case, A.D. 1722, a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains, during the time of his arraignment (*e*).

When he is brought to the bar (*f*),] in case of treason or felony, [he is called upon by name to hold up his hand; which, though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand *constat de personâ;* and he owns himself to be of that name by which he is called (*g*). However it is not an indispensable ceremony; for being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well; therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient (*h*).

Then the indictment is to be read to him distinctly in the English tongue; which was law even while all other proceedings were in Latin; that he may fully understand his charge. After which it is to be demanded of him, whether he be guilty of the crime whereof he stands indicted, or not guilty.]

[When a criminal is arraigned he either *stands mute* or *confesses the fact;* which circumstances we may call *incidents* to the arraignment; or else he *pleads* to the indictment; which is to be considered as the next stage of the pro-

(*e*) State Tr. vi. 230. Et vide Hawk. P. C. b. 2, c. 28, s. 1, n. (2); Waite's case, 1 Leach, C. C. 36.

(*f*) By 19 & 20 Vict. c. 16, s. 7, it is provided that whenever any indictment or inquisition shall have been transmitted or removed to the Central Criminal Court under the provisions of that Act, the person charged shall be arraigned in that court in the same manner in all respects as if the offence had been actually committed within the jurisdiction of the court, and the indictment or inquisition had been originally returned there.

(*g*) 2 Hale, P.C. 219.

(*h*) R. *v.* Ratcliffe, 1 W. Bl. 3.

[ceedings. But, first, let us observe these incidents to the arraignment—of standing mute, or confession.

I. Regularly a prisoner is said to stand mute when, being arraigned for treason or felony, he either, 1, makes no answer at all; or, 2, answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise (*i*).] In such case the rule of the antient law was, that a jury was to be impanelled to inquire whether the prisoner stood obstinately mute, or was dumb *ex visitatione Dei.* If the latter appeared to be the case, the judges were to proceed to the trial, and examine all points as if he had pleaded not guilty (*k*). But if found to be obstinately mute, then, in treason, it was held that standing mute was equivalent to conviction; and the law was the same as to all misdemeanors. But upon indictment for any other felony, the prisoner, after *trina admonitio*, and a respite of a few hours, was subject to the barbarous sentence of *peine forte et dure* (*l*); viz. [to be remanded to prison and put into a low dark chamber, and there laid on his back on the bare floor naked, unless where decency forbade; that

(*i*) He was also formerly considered as standing mute, if, upon pleading not guilty, he at the same time refused *to put himself upon the country*, that is, refer the matter to trial by jury. (2 Hale, P. C. 316; 4 Bl. Com. 324, 340.) But now, by statute 7 & 8 Geo. 4, c. 28, s. 1, he shall by the plea of not guilty, without any further form, be deemed to have put himself upon his country, for trial; and the court shall order a jury for the trial of such person accordingly.

(*k*) 4 Bl. Com. 324; Hawk. P. C. b. 2, c. 30, s. 7.

(*l*) Blackstone remarks on this punishment, that it has been doubted whether it subsisted at the common law, or was introduced in consequence of the statute Westminster the first, (3 Edw. 1, c. 12,) which he thinks the better opinion, and cites 2 Inst. 179; 2 Hale, P.C. 322; Hawk. P. C. b. 2, c. 30, s. 16; Staundf. P. C. 149; Barr. 82; Emlyn on 2 Hale, P. C. 322, and Year Book, 8 Hen. 4, c. 2. By which two latter authorities it would appear that at common law, the standing mute in felony was a confession of the charge. As to *peine forte et dure*, much information will be found in Reeves's Eng. L. vol. ii. p. 134; vol. iii. pp. 133, 250, 418. That author thinks it was introduced sometime between the fifth year of Henry the third, and the third year of Edward the first.

[there should be placed upon his body as great a weight of iron as he could bare, and more: that he should have no sustenance, save only on the first day three morsels of the worst bread, and on the second day three draughts of standing water that should be nearest to the prison door; and that in this situation such should be alternately his daily diet, *till he died;* or, as antiently the judgment ran, *till he answered* (*m*).]

Afterwards, however, it was provided by 12 Geo. III. c. 20, that standing mute in felonies should be equivalent to a conviction; and now by 7 & 8 Geo. IV. c. 28, s. 2, it is enacted, that if any person, being arraigned upon, or charged with, any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or informa-

(*m*) 4 Bl. Com. 327; Britt. cc. 4 and 22; Flet. l. 1, c. 34, s. 33; Hawk. P. C. b. 2, c. 30, s. 16. Blackstone (vol. iv. p. 326) remarks upon this strange proceeding, that it is a practice of a different nature from the *rack*, or *question*, to extort a confession from criminals,—*this* having been only used to compel a man to put himself upon his trial, *that* being a species of trial itself. As to the rack, he says that "it is utterly "unknown to the law of England; "though once, when the Dukes "of Exeter and Suffolk, and other "ministers of Henry the sixth, had "laid a design to introduce the civil "law into this kingdom as the rule "of government; for the beginning "thereof, they erected a rack for tor- "ture; which was called in derision "the Duke of Exeter's Daughter, "and still remains in the Tower of "London (3 Inst. 35), where it was "occasionally used as an engine of "state, not of law, more than once "in the reign of Queen Elizabeth. "But when upon the assassination "of Villiers, Duke of Buckingham, "by Felton, it was proposed, in the "Privy Council, to put the assassin "to the rack, in order to discover his "accomplices, the judges (being "consulted) declared unanimously, "to their own honour and the honour "of the English law, that no such "proceeding was allowable by the "laws of England." Mr. Hallam observes, that though it be most certain that the English law never recognized the use of torture, yet there were many instances of its employment in the reign of Elizabeth and James; and, among others, in the case of the Gunpowder Plot. He says, indeed, that in the latter part of the reign of Elizabeth, "the rack "seldom stood idle in the Tower;" and cites Lingard, (note U,) for a specification of the different kinds of torture used. Hall. Const. Hist. vol. i. p. 201; vol. ii. p. 11.

tion (*n*) :—in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person: and the plea so entered shall have the same force and effect, as if such person had actually pleaded the same (*o*). When there is reason to doubt, however, whether the prisoner is sane, a jury should be charged to inquire whether he is sane or not (*p*); which jury may consist of any twelve persons who may happen to be present (*q*); and upon this issue, the question will be whether he has intellect enough to plead, and to comprehend the course of the proceedings. If they find the affirmative, the plea of not guilty may be entered, and the trial will proceed (*r*); but if the negative, the provision of 39 & 40 Geo. III. c. 94, s. 2, is then applicable; by which it is enacted, that insane persons indicted for any offence, and on their arraignment found to be insane by a jury lawfully impanelled for that purpose, so that they cannot be tried upon the indictment,—shall be ordered by the court to be kept in strict custody till the royal pleasure be known.

(*n*) In the case where the prisoner is deaf and dumb, he may be communicated with by signs, or the indictment may be shown to him, with the usual questions written on paper. See Jones's case, 1 Leach, 120; Thompson's case, 2 Lewin, 137; R. *v.* Dyson, 7 Car. & P. 306; 1 Chit. Cr. L. 417.

(*o*) This course was taken in R. *v.* Bitton, 6 Car. & P. 306.

(*p*) See 39 & 40 Geo. 3, c. 94, s. 2; sup. p. 99. In several cases the course taken, when the prisoner has stood mute, has been to put *three* points to the jury; first, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of the proceedings. R. *v.* Dyson, 7 Car. & P. 305; R. *v.* Pritchard, ibid. 303.

(*q*) 1 Chit. Cr. L. 424.

(*r*) There have been several instances in which persons found to be mute by the visitation of God, have been tried, and had sentence passed upon them. (See Jones's case, 1 Leach, 120; Steel's case, 2 Leach, 507.) But in Blackstone's time it was a point yet undetermined whether judgment of death could be given against a prisoner who had never pleaded, and could say nothing in arrest of judgment. 4 Bl. Com 325; 2 Hale, P. C. 317; et vide Ch. Bl. *in notis*.

II. [The other incident to arraignment, exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession,] at least in capital cases, [out of tenderness to the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment (*s*).

But there is another species of confession, which we read much of in our antient books, of a far more complicated kind, which is called *approvement;* and that is, when a person, indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded; and appeals or accuses others, his accomplices, of the same crime, in order to obtain his pardon. In this case he is called an *approver*, or prover, *probator;* and the party appealed, or accused, is called the *appellee.* Such approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it; and if he hath no reasonable and legal exceptions to make to the person of the approver,—which indeed are very numerous,—he must put himself upon his trial by the country; and, if found guilty, must suffer the judgment of the law; and the approver shall have his pardon *ex debito justitiæ.* On the other hand, if the appellee be acquitted by the jury, the approver shall receive judgment to be hanged; upon his own confession of the indictment: for the condition of his pardon has failed, viz. the conviction of some other person; and therefore his conviction remains absolute.

But it is purely in the discretion of the court, to permit the approver thus to appeal or not; and, in fact, this course of admitting approvements hath been long disused; for the truth was, as Sir Matthew Hale observes, that more mischief arose to good men by these kinds of approvements, upon false and malicious accusations of despe-

(*s*) 2 Hale, P.C. 225.

[rate villains, than benefit to the public by the discovery and conviction of real offenders; and, therefore, in the times when such appeals were more frequently admitted, great strictness and nicety were held therein; though, since their discontinuance, the doctrine of approvements is become a matter of more curiosity than use (*t*).]

It has also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol,—in cases where it has appeared probable that the evidence would otherwise be insufficient to obtain a conviction,—to hold out a hope to some one of the accomplices, that if he will fairly disclose the whole truth as a witness on the trial, and bring the other offenders to justice, he shall himself escape punishment. Such an accomplice is usually said to be admitted to become *queen's evidence;* but his admission in that capacity, requires the subsequent sanction of the judges of gaol delivery (*u*). Nor will any person in general be admitted as queen's evidence, if it appear that he is charged with any other felony than that in question (*x*). The testimony of an accomplice is in all cases, indeed, regarded with just suspicion (*y*); and unless this statement is corroborated in some material part by unimpeachable evidence, the jury are usually advised by the judge to acquit the prisoner (*z*); and if the accomplice, after having confessed the crime, and being admitted as queen's evidence, fails in the condition on which he was so received, by refusing to give

(*t*) See 2 Hale, P. C. c. 29; Hawk. P. C. b. 2, c. 24.

(*u*) See R. *v.* Rudd, Cowp. 331.

(*x*) 2 C. & P. 411. See R. *v.* Lee, R. & R. C. C. R. 361; R. *v.* Brunton, ibid. 454.

(*y*) On this subject see the remarks of Holt, C. J., in Charnock's case, 4 St. Tr. 594.

(*z*) 1 Phil. Ev. 9th edit. 31; Taylor on Evidence, p. 779, 2nd edit. And as to the nature of the confirmation required, see R. *v.* Addis, 6 C. & P. 388; R. *v.* Webb, ibid. 595; R. *v.* Moores, 7 C. & P. 270; R. *v.* Wilkes, ibid. 272; Despard's case, 28 How. St. Tr. 488. It is held, however, that the jury may legally convict, if they think fit, on the unsupported testimony of an accomplice. 1 Phil. Ev. 30; R. *v.* Hastings, 7 C. & P. 152; Taylor on Evidence, p. 779, 2nd edit.; R. *v.* Stubbs, 1 Dearsley's C. C. R. 555.

fair and full information, he is then himself liable to be tried for the offence, and may be convicted on his own confession (*a*).

(*a*) 1 Phil. Ev. 29. Upon a trial at York before Mr. Justice Buller, the accomplice denied in his evidence all that he had before confessed; upon which the prisoner was acquitted. But the judge ordered an indictment to be preferred against the accomplice for the same crime; and on his previous confession, and other circumstances, he was convicted and executed. (Christian's Blackstone.)

CHAPTER XXI.

OF PLEA AND ISSUE.

[WE are now to consider the plea of the prisoner (*a*),] or defendant; that is, the [defensive matter alleged by him on his arraignment, if he does not confess or stand mute. This is either—1. A plea to the jurisdiction. 2. A demurrer (*b*). 3. A plea in abatement. 4. A special plea in bar: or, 5. The general issue (*c*).]

(*a*) By 19 & 20 Vict. c. 16, s 6, it is provided, that on application to the Queen's Bench for an order under that Act, that a person charged with any offence committed, or supposed to have been committed, out of the jurisdiction of the Central Criminal Court, shall nevertheless be there tried,—it shall not be necessary for such person to plead any plea to such indictment or inquisition in the Queen's Bench, when the order applied for is made.

(*b*) It has not been thought material to alter this arrangement of Blackstone's; but, in strictness, a *demurrer* is not a *plea*. It is rather an exception taken to the indictment or information, as a reason why the defendant should not be compelled to plead to its allegations. As to demurrer in civil cases (to which this is equivalent), vide sup. vol. III. p. 570.

(*c*) Besides these pleas, there were formerly the *declinatory* pleas (2 Hale, P. C. 236) of *sanctuary*, and *benefit of clergy*. As to the former, we may remark, that the law of sanctuary was introduced and continued during the superstitious veneration paid to consecrated ground in the time of popery; and existed in England from a period soon after the conversion of the Saxons to Christianity. (Reeves's Eng. Law, vol. i. p. 19; et vide ibid. vol. iii. p. 137; vol. iv. pp. 182, 314, 320.) The statement of this law by Blackstone (vol. iv. p. 332) is as follows:—"If "a person accused of any crime, "except treason and sacrilege, had "fled to any church or churchyard, "and within forty days after, went "in sack-cloth and confessed him-"self guilty before the coroner; and "declared all the particular circum-"stances of the offence, and took the "oath in that case provided, viz. that "he abjured the realm, and would "depart from thence forthwith at "the port which should be assigned

I. [A plea to the jurisdiction (*d*), is where an indictment is taken before a court that hath no cognizance of the offence: as if a man be indicted for a rape at the sheriff's tourn; or for treason at the quarter sessions. In these or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alleged (*e*).] But a formal plea to the jurisdiction is of rare occurrence: it being competent to a defendant to bring forward this sort of objection, in some cases by way of demurrer, or by motion in arrest of judgment; in others under the general issue (*f*).

"him, and would never return without leave from the king; he, by "this means saved his life, if he "observed the conditions of the oath, "by going with a cross in his hand, "and with all convenient speed, to "the port assigned, and embarking. "For if during this forty days' privilege of sanctuary, or on his road "to the sea side, he was apprehended and arraigned in any court "for this felony, he might plead the "privilege of sanctuary, and had a "right to be remanded if taken out "against his will"—(Mirr. c. 1, s. 13; Hawk. P. C. b. 2, c. 32.) But by this abjuration his blood was attainted, and he forfeited all his goods and chattels. (Hawk. P. C. b. 2, c. 9, s. 44.) The immunity of these sanctuaries,—which consisted not only of churches and churchyards, but of certain other places in various parts of this kingdom, viz. in Westminster, Wells, Norwich, York, &c.—was very much abridged by the statutes 26 Hen. 8, c. 13; 27 Hen. 8, c. 19, and 39 Hen. 8, c. 12; and now by the statute 21 Jac. 1, c. 28, all privilege of sanctuary, and abjuration consequent thereupon, is utterly taken away and abolished; and the opposing of any process in pretended privileged places made penal, by the statutes 8 & 9 Will. 3, c. 27; 9 Geo. 1, c. 28; 11 Geo. 1, c. 22; 1 Geo. 4, c. 116; as to which, vide sup. p. 293.

As to *benefit of clergy*, vide post, c. XXIII. We shall only remark here, that though it might be the subject of a plea, it was not usually brought forward in that shape, but in arrest of judgment.

(*d*) By 19 & 20 Vict. c. 16, s. 7, wherever any indictment or inquisition shall have been transmitted or removed to the Central Criminal Court, under the provisions of that Act,—any person charged with any offence thereby shall plead to such indictment or inquisition, and shall be tried in the said Central Criminal Court, in the same manner in all respects as if such offence had been actually committed within the jurisdiction of that court, and the indictment or inquisition had been originally there presented or returned.

(*e*) 2 Hale, P. C. 256.

(*f*) R. *v.* Fearnley, 1 T. R. 316; R. *v.* Johnson, 6 East, 583.

II. [A demurrer. This is incident to criminal cases as well as civil,] when the fact as alleged is allowed to be true, but the defendant takes exception, in point of law, to the sufficiency of the indictment or information, on the face of it: as if he insists that the fact as stated is no felony, treason, or whatever the crime is alleged to be. [Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound :] which is an animal not the subject of larceny at common law (*g*), and the stealing whereof is not made felony by any statute, but only a misdemeanor (*h*); —[in this case, the party indicted may demur to the indictment, denying it to be felony, though he confesses the act of taking the animal.] If on demurrer to an indictment, the point of law be adjudged *for* the defendant, and the objection be on matter of substance, the judgment is that he be dismissed and discharged : if the objection be merely formal, then that the indictment be quashed (*i*). On the other hand, if the judgment be *against* the defendant, and the offence for which he is indicted be a misdemeanor or a felony, but not capital—such judgment, according to the better authorities, is final (*k*). And even in capital cases [some have held (*l*), that if, on demurrer, the point of law be adjudged against the defendant, he shall have judgment and execution as if convicted by verdict.] But by modern authorities it has been held, that he shall in such cases be allowed to plead the general issue, not guilty, after a demurrer determined against him; or, at his option, may demur and plead over to the indictment at the same time (*m*); which doctrine appeared also to Black-

(*g*) Vide sup. p. 185.

(*h*) See 8 & 9 Vict. c. 47, sup. vol. II. p. 8.

(*i*) 1 Chit. Cr. L. 443, 444; Andr. 147.

(*k*) Hawk. P. C. b. 2, c. 31, s. 7; R. *v.* J. Taylor, 3 B. & C. 502; R. *v.* Bowen, C. & Kir. 503; Reg. *v.* Faderman, 1 Den. C. C. 565.

(*l*) Bro. *Peremptory*, 86; Staundf. 150, C.; 2 Inst. 178; 2 Ha[illegible] P. C. 257.

(*m*) R. *v.* Phelps, 1 C. & M. 181; R. *v.* Adams, ib. 299; R. *v.* Brown, ib. 503; R. *v.* Purchase, ib. 617.

stone (*n*) [the more reasonable, because it is clear that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court whether it be felony or no, and upon the fact thus shown it appears to be felony,—the court will not record the confession, but admit him afterwards to plead not guilty (*o*). And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading;] and it must be presumed that [the law will not suffer him by such niceties to lose his life.] Owing to this uncertainty, however, as to the proper form of judgment, and the power that has been allowed to defendants of urging all objections upon the general issue, or by motion in arrest of judgment, as well as upon demurrer, demurrers to indictments have been seldom used; though objections at this early stage have been not unfrequently taken in another and more summary shape, viz. by a motion on the part of the prisoner to *quash* the indictment (*p*); a course which, in a very clear and obvious case, the practice of the courts allow (*q*). But the power of bringing forward objections at a later period is now materially limited; it being provided by 14 & 15 Vict. c. 100 (*r*), that all objections for *formal* defects shall be taken by demurrer or motion to quash the indictment, and not afterwards; and shall be amendable forthwith.

III. A plea in abatement, or dilatory plea, is founded on some matter of fact extraneous to the indictment, tending to show that it is defective in point of form; and has principally occurred in the case of a *misnomer*; i. e. a wrong name, or a false addition to the defendant, as where James Allen, gentleman, has been indicted by the name of

(*n*) 4 Bl. Com. 334, et vide Hawk. P. C. b. 2, c. 31, ss. 5, 6.

(*o*) 2 Hale, P. C. 225.

(*p*) The court may also quash the indictment on its own view. R. *v.* Wilson, 6 Q. B. 620; R. *v.* Dunn, Ry. & M. P. C. 146.

(*q*) 1 Chit. Cr. L. 299.

(*r*) 14 & 15 Vict c. 100, ss. 24, 25. Et vide 7 Geo. 4, c. 64, s. 20.

John Allen, esquire, and has pleaded that he has the name of James and not of John, and that he is a gentleman and not an esquire. But in the case of misnomer, no advantage at all now accrues to the defendant by a plea in abatement; for by 7 Geo. IV. c. 64, s. 19, no indictment or information shall be abated by reason of any dilatory plea of misnomer: but if the court shall be satisfied, by affidavit or otherwise, of the truth of such plea, it shall forthwith cause the indictment or information to be amended according to the truth; and shall call upon the party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded: and by 14 & 15 Vict. c. 100, s. 24, no indictment shall be held insufficient for want of, or imperfection in, the addition of any defendant. Let us therefore next consider a more substantial kind of plea, viz.

IV. [A special plea in bar; which goes to the merits of the indictment], and gives a reason why the prisoner ought to be discharged from the prosecution. These are principally of four kinds (*s*). A former acquittal; a former conviction; a former attainder; or a pardon.

1. The plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy more than once, for the same offence (*t*): [and hence it is allowed as a consequence, that when a man is once fairly found not guilty upon an indictment or other prosecution, before any court having a competent jurisdiction of the

(*s*) In the particular case where a parish or county is indicted for not repairing a road or a bridge respectively, another kind of special plea in bar occurs; for the parish or county may respectively plead, in discharge of their own presumptive liability, that some other party is liable to a special obligation to repair. As to repairs of highways, &c. vide supra, vol. III. p. 232.

(*t*) "Jeopardy *of his life*," is the expression of Blackstone (vol. iv. p. 335) The maxim, however, is not confined to capital felonies, but extends even to misdemeanors. See an instance of *autrefois acquit* pleaded in a case of misdemeanor, R. *v.* Taylor, 3 B. & C. 502.

[offence (*u*), he may plead such acquittal in bar of any subsequent accusation for the same crime.] This however applies only to an acquittal by verdict of a petit jury (*x*): and therefore if a man be committed for a crime, and no bill be preferred against him, or the bill be thrown out by the grand jury, he is still liable to be indicted (*y*). It applies, also, only to the case where the first indictment was not substantially erroneous. For if it were, the former prosecution is no bar, because the defendant was never legally in jeopardy (*z*). It is also to be observed, that, in general, the crime of which the defendant was before acquitted must be identical with that with which he now stands charged: but, upon this point distinctions of much nicety arise. Thus, if a man be acquitted upon an indictment of murder, he may not only plead *autrefois acquit* to a subsequent indictment for the murder, but even to an indictment for the manslaughter of the same person; or *è converso*, if he be indicted for manslaughter, and be acquitted, he shall not be indicted for the same death, as murder; for the two cases differ only in degree, and the fact is the same (*a*). So if he be indicted for a murder, as committed on a certain day, and afterwards indicted again for the murder of the same person on a different day, he may plead *autrefois acquit*, and aver it to be the same felony; for the day is not material (*b*). On the other hand, if a man be indicted as accessory, and acquitted, that acquittal will be no bar to an indictment as principal, nor *è converso* (*c*). It was formerly doubted, in-

(*u*) Beak *v.* Thyrwhit, 3 Mod. 194; Hawk. P. C. b. 2, c. 35, s. 10.

(*x*) 2 Hale, P. C. 243, 246; Hawk. P. C. b. 2, c. 35, s. 6.

(*y*) 1 Chit. Cr. L. 458; 2 Hale, P. C. ubi supra.

(*z*) 4 Rep. 45, a; 2 Hale, P. C. 393.

(*a*) 2 Hale, P. C. 246.

(*b*) 2 Hale, P. C. 244. Hale adds, "Besides the death is of a person "certain, who can be but once "killed." The same law, however, as he himself observes (ibid.), applies to an indictment of robbery; though it is possible that several robberies may be committed on several days.

(*c*) 2 Hale, P. C. 244.

deed, whether he might not plead an acquittal as principal, to a second indictment charging him as accessory before the fact; but the general doctrine is now held to apply to that case also (*d*). For though the offence may in some respects be considered as the same, the prisoner may be convicted under the second indictment, upon facts which would not have warranted his conviction under the first. We may conclude our remarks on the subject of the plea of *autrefois acquit*, by observing, that the defendant in adopting this plea, usually also pleads at the same time the general issue, denying the felony charged; and if the former plea is found against him, the trial proceeds upon the second (*e*).

2. [The plea of *autrefois convict*, or a former conviction for the same identical crime, is a good plea in bar to an indictment: and this depends upon the same principle as the former, that no man ought to be twice brought into danger for one and the same crime; and is governed in general by the same rules (*f*).] This plea applies where upon the former conviction no judgment was ever actually given; but supposing it to have been followed by an actual judgment of death, the defendant may then resort to—

3. [The plea of *autrefois attaint*, or a former attainder (*g*)] for the same crime; which is also a good plea in bar, depending upon the same principle and governed in general by the same rules as the plea of *autrefois convict*. It might formerly indeed have been pleaded where a man,

(*d*) Hawk. P. C. b. 2, c. 35, s. 11; 2 Hale, P. C. 214; Fost. 361; R. *v.* Birchenough, 1 M. C. C. R. 477; R. *v.* Parry, 7 C. & P. 836.

(*e*) Arch. Cr. L. by Jervis, 9th ed. p. 91; R. *v.* Sheen, 2 Car. & P. 635. As to this plea, and also as to that of *autrefois convict*, it is provided by 14 & 15 Vict. c. 100, s. 28, that "it "shall be sufficient for the defendant "to state that he has been lawfully "acquitted or convicted (as the case "may be) of the said offence charged "in the indictment." And see as to the plea of *autrefois acquit*, Queen *v.* Bird, 20 L. J. (M. C.) 70.

(*f*) Hawk. P. C. b. 2, c. 36, s. 10.

(*g*) As to attainder, vide post, c. XXIII.

after being attainted of one felony, was afterwards indicted for *another* (*h*); for the prisoner being considered as dead in law by the first attainder, and having therefore already forfeited all that he had, it was considered as [absurd and superfluous to endeavour to attaint him a second time;] but now, by 7 & 8 Geo. IV. c. 28, s. 4, it is enacted, that no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment.

4. [Lastly, a *pardon* (*i*) may be pleaded in bar, as at once destroying the end and purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, *before* sentence is past, which gives it by much the preference to pleading it *after* sentence or attainder. That is, that, by stopping the judgment, it stops the attainder; and prevents the corruption of blood,] which follows in certain cases on conviction; and which cannot afterwards be purged except by Act of parliament (*k*). [But as the title of pardons is applicable to other stages of prosecution,]—a pardon being pleadable (according to the period at which it is obtained) not only in bar of the indictment; but, after verdict, in arrest of judgment; or, after judgment, in bar of execution:—the more minute consideration of them shall be reserved, till we have gone through every other title except only that of execution.

[Before we conclude this head of special pleas in bar, it will be necessary to observe, that though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea; and cannot resort to another if that be determined against him (*l*); as if, on an action of

(*h*) 4 Bl. Com. 336; Hawk. P. C. b. 2, c. 36.

(*i*) As to pardons, vide post, c. xxv.

(*k*) 4 Bl. Com. 338.

(*l*) It will be understood that Blackstone is speaking here of the case of first pleading one plea (or several together, as the case may be), and afterwards, on failure of these, attempting to place another on the

[debt, the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue,] that he was never indebted as alleged (*m*), as he might at first—[for he has made his election what plea to abide by, and it was his own folly to choose a rotten defence;] yet in criminal prosecutions for felonies that rule is disregarded (*n*). For in such cases, [though a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court, still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster;* and may plead over to the felony the general issue, not guilty (*o*).] For the law allows many pleas by which a prisoner may escape the punishment of felony, but only one plea in consequence whereof they can be inflicted; [viz. on the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury. It remains therefore that we consider—

V. The general issue, or plea of *not guilty.*] This is the proper form wherever the prisoner means either to deny or to justify the charge in the indictment; in which case a special plea is generally improper. Thus [on an indictment for murder, a man cannot *plead* that it was in his own defence, against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For, (besides that these pleas do in effect amount to the general issue, since, if true, the prisoner is most clearly not guilty,) as the facts in

record: not to the case of pleading several pleas contemporaneously, and, on failure to establish one of these, taking the benefit of another; —which the practice in civil cases permits, vide sup. vol. III. p. 579.

(*m*) As to this plea, vide sup. vol. III. p. 572.

(*n*) R. *v.* Gibson, 8 East, 110. This is confined, as stated in the text, to felonies. It does not apply to indictments or informations for misdemeanors (R. *v.* Taylor, 3 B. & C. 502), being originally established only *in favorem vitæ.*

(*o*) 2 Hale, P. C. 239.

[treason are laid to be done *proditoriè et contra ligeantiæ suæ debitum*, and the felony, that the killing was done *felonicè*; these charges of a traitorous or felonious intent are the points and very *gist* of the indictment; and must be answered directly by the general negative, not guilty,—] the effect of which is, that on the one hand it puts the prosecutor to the proof of every material fact alleged in the indictment or information; and on the other it entitles the defendant to avail himself of any defensive circumstances, as amply as if he had pleaded them in a specific form. [So that this is, upon all accounts, the most advantageous plea for the prisoner (*p*).]

By the plea of not guilty, the prisoner puts himself upon the trial by jury (*q*); and when the record comes afterwards to be made up, (for the proceedings ought regularly to be *recorded*, according to the analogy of the practice in civil cases (*r*)), the prosecutor on the part of the Crown adds the *similiter* (as it is called), by the words that he "doth the like (*s*)." But even before this formal entry, the similiter is supposed to be added by the prosecutor, immediately on the plea of not guilty being pleaded by the defendant (*t*),—which brings the parties to

(*p*) 2 Hale, P. C. 258. This plea, as we have seen, the court may order to be entered for the defendant, when he stands mute of malice, &c.; vide sup. pp. 459, 460.

(*q*) The defendant, on pleading not guilty, used formerly to refer the matter expressly to the trial by jury (vide post, p. 467); but by 7 & 8 Geo. 4, c. 28, s. 1, he is now to be deemed to do so (in treason or felony) by simply pleading not guilty.

(*r*) Vide sup. vol. III. p. 590.

(*s*) By 7 & 8 Geo. 4, c. 64, s. 20, no judgment after verdict shall be stayed or reversed for want of a *similiter*.

(*t*) Other ceremonies were formerly observed,—which involve the true etymology of the word *culprit*. When the prisoner pleaded not guilty, *non culpabilis*, or *nient culpable*, it was abbreviated on the minutes of the court thus, "*non* (or *nient*) *cul.*," and the joining of issue thereon by the prosecutor was expressed by the abbreviation "*prit.*," the precise origin of which latter expression is somewhat doubtful. In course of time, it became the practice for the officer of the court to read aloud these words, without regard to their real meaning (which was beginning to be forgotten, owing to the disuse of law French); and to apply them

issue (*u*). [And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.]

as an appellation of the prisoner himself; for when a prisoner pleaded not guilty, the officer used to say, "*Culprit*, how wilt thou be tried?" to which the latter usually added, "By God, and the country," meaning by a jury. (Vide 4 Bl. Com. 339, and note by Christian.) Blackstone also takes occasion, in reference to this subject, to remark upon another corruption which has taken place and is still observable in the law French; viz. in the prologue to all our public proclamations, *oyez*, or *hear ye*, which is generally pronounced, most unmeaningly, *oh! yes!*

(*u*) As to the term issue, vide sup. vol. III. p. 568.

CHAPTER XXII.

OF TRIAL AND CONVICTION.



[The several methods of trial and conviction of offenders, established by the laws of England, were formerly more numerous than at present, through the superstition of our Saxon ancestors; who, like other northern nations, were extremely addicted to divination, a character which Tacitus observes of the antient Germans (*a*). They therefore invented certain methods of purgation or trial, to preserve innocence from the danger of false witnesses; and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless.] To these, though long since laid aside, some notice seems to be due, on account of their legal and historical associations, and as matter of curiosity, before we proceed to those existing methods which constitute the proper subject of the chapter.

1. [The most antient species of trial was that by *ordeal* (*b*); which was peculiarly distinguished by the appellation of *judicium Dei*, and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party (*c*). This was of two sorts (*d*), either *fire*-ordeal, or *water*-ordeal; the former being con-

(*a*) De Mor. Germ. 10.

(*b*) Wilk. Leges Ang. Sax. LL. Inæ, c. 77. See as to this ordeal, Turn. Angl. Sax. vol. ii. p. 532; Hall. Mid. Ag. vol. ii. p. 466; in which last work an instance is given of a citizen of London undergoing the ordeal of cold water, in a case of murder, in the reign of Henry the second, and on failure therein being hanged.

(*c*) Vide sup. p. 13, n. (*f*).

(*d*) Mirr. c. 3, s. 23.

[fined to persons of higher rank, the latter to the common people (*e*). Both these might be performed by deputy; but the principal was to answer for the success of the trial, the deputy only venturing some corporal pain for hire, or perhaps for friendship (*f*). Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red hot iron, of one, two, or three pounds weight; or else by walking,—bare foot, and blindfold,—over nine red hot plough-shares, laid lengthwise, at unequal distances; and if the party escaped being hurt, he was adjudged innocent: but if it happened otherwise, (as without collusion it usually did,) he was then condemned as guilty. However, by this latter method, queen Emma, the mother of Edward the Confessor, is mentioned to have cleared her character, when suspected of familiarity with Alwyn, Bishop of Winchester (*g*).

Water-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby: or by casting the person suspected into a river or pond of cold water; and, if he floated therein without any action of swimming, it was deemed an evidence of his guilt, but if he sank, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity that has been practised, in many countries, to discover witches by casting them into a pool of water, and drowning them to prove their innocence. And in the eastern empire the fire-ordeal was used to the same purpose by the emperor Theodore Lascaris; who, attributing his sickness to magic, caused all those, whom he suspected, to handle the hot iron; thus joining, as has been well re-

(*e*) "*Tenetur se purgare is qui accusatur, per Dei judicium; scilicet per calidum ferrum, vel per aquam, pro diversitate conditionis hominum: per ferrum calidum, si fuerit homo liber; per aquam, si fuerit rusticus.*"—Glanv. s. 14, c. 1.

(*f*) This is still expressed in that common mode of speech, "of going through fire and water to serve another."

(*g*) Tho. Rudborne, Hist. Maj. Winton, l. 4, c. 1.

[marked (*h*), to the most dubious crime in the world the most dubious proof of innocence.

And indeed this purgation by ordeal, seems to have been very antient, and very universal, in the times of superstitious barbarity. It was known to the antient Greeks; for, in the Antigone of Sophocles (*i*), a person suspected by Creon of a misdemeanor, declares himself ready "to handle hot iron and to walk over fire," in order to manifest his innocence; which, the scholiast tells us, was then a very usual purgation. And Grotius (*k*) gives us many instances of water-ordeal in Bithynia, Sardinia, and other places.

One cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended, by an immediate interposition of Providence to save the innocent, whenever it was presumptuously required; and yet in England, so late as King John's time, we find grants to the bishops and clergy, to use the *judicium ferri, aquæ, et ignis* (*l*). And both in England and Sweden, the clergy presided at this trial; and it was only performed in the churches or in other consecrated grounds: for which Stiernhook gives the reason, "*non defuit illis operæ et laboris pretium; semper enim ab ejusmodi judicio, aliquid lucri sacerdotibus obveniebat* (*m*)." But to give it its due praise, we find the canon law very early declaring against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "*cum sit contra præceptum Domini, non tentabis Dominum Deum tuum* (*n*)." Upon this authority,—though the canons themselves were of no validity in England,—it was thought proper to disuse and abolish this trial entirely in our courts of justice, by an Act of parliament in the third year of Henry the

(*h*) Sp. L. b. 12, c. 5.

(*i*) V. 270.

(*k*) On Numb. v. 17. Et vide Mod. Univ. Hist. vii. 266.

(*l*) Spelm. Gloss. 435.

(*m*) De Jure Sueon. l. 1, c. 8.

(*n*) Decret. part 2, caus. 2, qu. 5, dist. 7; Decret. lib. 3, tit. 50, c. 9; and Gloss. ibid.

[third, according to Sir Edward Coke (*o*); or rather by an order of the king in council (*p*).

II. Another species of purgation,—somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition,—was the *corsned*, or morsel of execration; being a piece of cheese or bread of about an ounce in weight, which was consecrated with a form of exorcism, desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment if he was innocent (*q*): as the water of jealousy, among the Jews (*r*), was, by God's special appointment, to cause the belly to swell, and the thigh to rot, if the woman was guilty of adultery. This corsned was then given to the suspected person, who at the same time also received the holy sacrament (*s*); if, indeed, the corsned was not, as some have suspected, the sacramental bread itself, till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians assure us, that Godwin, earl of Kent, in the reign of king Edward the Confessor, abjuring the death of the king's brother, at last appealed to his corsned, "*per buccellam deglutiendam abjuravit* (*t*);" which stuck in his throat and killed him. This custom has been long since gradually abolished; though the remembrance of it still subsists, in certain phrases of abjuration retained among the common people (*u*).

(*o*) 9 Rep. 32. It had been abolished in Denmark above a century before. Mod. Un. Hist. xxxii. 105.

(*p*) 1 Rym. Fœd. 228; Spelm. Gloss. 326; 2 Pryn. Rec. Append. 20; Seld. Eadm. fol. 48.

(*q*) Spelm. Gloss. 439.

(*r*) Numb. v.

(*s*) "*Si quis alteri ministrantium accusetur et amicis destitutus sit cum sacramentales non habeat, vadat ad judicium quod Anglicè dicitur* 'corsned,' *et fiat sicut Deus velit, nisi super sanctum corpus Domini permittatur ut se purget.*"—Wilk., Leges Ang. Sax. LL. Canut. c. 6.

(*t*) Ingulph.

(*u*) As "I will take the sacrament upon it," "May this morsel be my last," and the like.

[These two antiquated methods of trial, were principally in use among our Saxon ancestors.] The next,—which though in modern times almost wholly laid aside, yet remained in force in the English law, till its abolition by a late statute (*x*),—[owed its introduction among us to the princes of the Norman line; and that is—

III. The trial by *battel*, duel, or single combat (*y*); which was another species of presumptuous appeal to Providence, under an expectation that Heaven would unquestionably give the victory, to the innocent or injured party.] This obtained in appeals (*z*), and in approvements (*a*); and also in the civil action called a writ of right (*b*). [The first written injunction of judiciary combats that we meet with, is in the laws of Gundebald, A.D. 501, which are preserved in the Burgundian code; yet it does not seem to have been a local custom of this or that particular tribe, but to have been the common usage of all the northern people from the earliest times (*c*).] In a writ of right, [when the tenant pleaded the general issue; viz. that he had more right to hold than the demandant to recover;] he might offer to prove it by the body of his champion (*d*): which tender being accepted by the de-

(*x*) 59 Geo. 3, c. 46. This statute expressly abolished wager of battel in writs of right; and incidentally also in appeals in criminal cases, by abolishing the appeal itself.

(*y*) On this subject some valuable information will be found in Hallam's Mid. Ag. vol. i. p. 277—294.

(*z*) Vide sup. p. 445.

(*a*) Vide sup. p. 461. It was also, says Blackstone, used in the court marshal or court of chivalry and honour (3 Bl. Com. 337); he cites Co. Lit. 261.

(*b*) Vide supra, vol. III. p. 480.

(*c*) Seld. on Duels, c. 5; et vide Stiern. de Jure Sueon. l. 1, c. 7. Mr. Hallam says (vol. i. 278, *in notis*), that it may be met with under the first Merovingian kings in France; and was established by the laws of the Alemanni or Swabians, and also of the Lombards; and he cites Baluz. t. 1, p. 80, and Muratori, Script. Rer. Ital. t. 2, c. 65.

(*d*) The wager of battel was the only decision of the question of right on a writ of right, after the Conquest,—until Henry the second, by consent of parliament, introduced the *grand assize*, a peculiar species of trial by jury,* in concurrence therewith; giving the tenant his choice of either the one or the other. The establish-

mandant, the champion for the tenant threw down his glove, as a gage or pledge; and was then said to *wage* battel with the champion of the demandant; who by taking up the gage or glove accepted on his part such challenge (*e*); and the battel was thus waged by champions, and not by the parties themselves, in order principally, as it would seem, [that no person might claim an exemption from this trial; as was allowed in criminal cases, where the battel was waged in person (*f*).] A piece of ground was then set out; and the champions were introduced, armed with batons and staves an ell long, and a four-cornered leather target. [In the court military, indeed, they fought with sword and lance, according to Spelman and Rushworth: as likewise in France only villeins fought with the buckler and baton; gentlemen, armed at all points. And upon this and other circumstances, Montesquieu (*g*) hath, with great ingenuity, not only deduced the impious custom of private duels on imaginary points of honour,—but hath also traced the heroic madness of knight errantry, from the same original of judicial combats. But to proceed:]

When the champions arrived within the lists, the champion of the tenant took his adversary by the hand, and made oath that the tenements in dispute were not the right of the demandant: and the champion of the demandant, then taking the other by the hand, swore in the same manner that they were; next an oath against sorcery and

ment of this alternative, Glanvil, chief justice to Henry the second, and probably his adviser herein, considers as a most noble improvement, (as in fact it was,) of the law. "*Est autem magna assisa regale quoddam beneficium, clementia principis, de consilio procerum, populis indultum; quo vitæ hominum, et status integritati tam salubriter consulitur, ut in jure quod quis in libero soli tenemento possidet retinendo, duelli casum declinare possint homines ambiguum. Ac per hoc contingit, insperatæ et præmaturæ mortis ultimum evadere supplicium, vel saltem perennis infamiæ opprobrium illius infesti et inverecundi verbi, quod in ore victi turpiter sonat, consecutivum.*"—L. 2, c. 7.

(*e*) 3 Bl. Com. 338, 339.

(*f*) See also on the reason of this practice, Co. Litt. 294; Dyversité des Courtes, 304.

(*g*) Sp. L. b. 28, cc. 20, 22.

enchantment, was to be taken by both the champions, in this or a similar form, "Hear this, ye justices, that I have "this day neither eat, drank, nor have upon me neither "bones, stones, ne grass, nor any enchantment, sorcery, or "witchcraft, whereby the law of God may be abased, or "the law of the devil exalted.—So help me God and his "saints (*h*)."

The battel was thus begun; and the combatants were bound to fight till the stars appeared in the evening: and if the champion of the tenant could defend himself till the stars appeared, the tenant was to prevail in his cause; but if victory declared itself for either party, for him was judgment finally given. This victory might arise from the death of either of the champions, or by either champion proving *recreant*, i. e., yielding, and pronouncing the horrible word of *craven;* a word of disgrace and obloquy, rather than any determinate meaning (*i*). The effect of the termination of the battel in either of these modes was, that the vanquished party forfeited his claim, and paid a fine (*k*): and the champion, if recreant, was condemned *amittere liberam legem;* i. e., to become infamous, and not to be accounted *liber et legalis homo*, being supposed by the event to be proved foresworn, and not fit to be put upon a jury, or admitted as a witness in any cause (*l*).

(*h*) 3 Bl. Com. p. 340, who cites Dyer, 301, and Spelm. Gloss. 103. Et vide Rushw. Coll. vol. ii. pt. 2, fol. 112; 19 Rym. 322; R. *v.* Dryden, Cro. Car. 512, and 11 Harg. St. Tr. 124, where will be found an account of the proceedings in the last trial by battel, which took place in this country, viz. that in the case of Lord Rea *v.* Ramsey (7 Car. 1). Mr. Hallam, (vol. i. p. 278, 7th ed.,) refers for the ceremonies of trial by combat, to Houard, Anc. Loix de France, t. 1, p. 264; Velly, t. 6, p. 106; Recueil des Historiens, t. 2, pref. p. 189; Ducange, v. *Duellum;* but says the great original authorities are the Assises de Jerusalem, c. 104, and Beaumanoir, c. 31.

(*i*) 3 Bl. Com. 340.

(*k*) Hall. Mid. Ag. ubi sup.

(*l*) 3 Bl. Com. 340. The compiler of the *Assises de Jerusalem*, c. 167, thinks it would be very injurious if no wager of battel were to be allowed against witnesses in causes affecting succession; since otherwise every right heir might be disinherited; as it would be easy to find two persons who would perjure them-

In an appeal or approvement, the trial by battel might also be demanded at the election of the appellee, and was carried on with equal solemnity, as in a writ of right: but as each party was here to fight in his proper person,—the appellant or approver, if a woman, a priest, an infant, or of the age of sixty, or lame or blind, might counterplead, and refuse the wager of battel, and compel the appellee to put himself upon the country, that is, submit to trial by jury. Also peers of the realm, bringing an appeal, were not to be challenged to wage battel, on account of the dignity of their persons; nor the citizens of London by special charter, because fighting seems foreign to their education and employment. So likewise if the crime were notorious, as if the thief were taken with the *mainour* (*m*), or the murderer in the room with the bloody knife,—the appellant might refuse the tender of battel from the appellee (*n*); for it was unreasonable that an innocent man should stake his life against one who was already half convicted (*o*).

[The form and manner of waging battel upon appeals and approvements, were much the same as upon a writ of right (*p*). The appellee, when appealed of the felony, pleaded not guilty, and threw down his glove; and declared he would defend the same with his body. The appellant, in accepting the challenge, took up the glove; and replied that he was ready to make good his appeal, body for body: and thereupon the appellee, taking the Bible in his right hand, and in his left the right hand of his antagonist, swore to this effect, "*Hoc audi, homo, quem per manum teneo,*

selves for money, if they had no fear of being challenged for their testimony. The demandant's champion was in fact a *witness* upon the question of right; and this passage, as Mr. Hallam remarks, "indicates the "real cause of preserving the judi- "cial combat; systematic perjury in "witnesses, and want of legal dis- "crimination in judges." — Hall. Mid. Ag. vol. i. p. 282.

(*m*) Vide sup. p. 439.

(*n*) Hawk. P. C. b. 2, c. 45, s. 7. An example of a counterplea of wager of battel, on the principle mentioned in the text, actually occurred in the modern case of Ashford *v.* Thornton, (1 Barn. & Ald. 405,) just before the abolition of appeals, in the year 1819, by 59 Geo. 3, c. 46.

(*o*) 4 Bl. Com. 347.

(*p*) Flet. l. 1, c. 34; Hawk. P. C. b. 2, c. 45.

[" &c.," "Hear this, O man, whom I hold by the hand, "who callest thyself John by the name of baptism, that I, "who call myself Thomas by the name of baptism, did not "feloniously murder thy father, William by name, nor am "anywise guilty of the said felony; so help me God and "the saints; and this I will defend against thee by my "body, as this court shall award." To which the appellant replied, holding the Bible and his antagonist's hand in the same manner as the other, "Hear this, O man, whom I "hold by the hand, who callest thyself Thomas by the "name of baptism, that thou art perjured; and therefore "perjured, because that thou feloniously didst murder my "father, William by name; so help me God and the "saints: and this I will prove against thee by my body, "as this court shall award (*q*)." The battel was then fought with the same weapons, the same solemnities, and the same oaths against amulets and sorcery, that were used in the civil combat: and if the appellee were so far vanquished as not to be able or willing to fight any longer, he was adjudged to be hanged immediately; and then, as also if he were slain in the battel, Providence was deemed to have determined against him, and his blood was attainted. But if he killed the appellant, or could maintain the fight from sun rising till the stars appeared in the evening, he was acquitted. So also if the appellant became recreant, and pronounced the word craven, he lost his *liberam legem* and became infamous; and the appellee recovered his damages, and was for ever quit, not only of the appeal, but of all indictments likewise for the same offence (*r*).

IV. The fourth method of trial in criminal cases, is that

(*q*) There is a striking resemblance between this process and that of the court of Areopagus, at Athens, for murder; wherein the prosecutor and prisoner were both sworn in the most solemn manner, the prosecutor that he was related to the deceased (for none but near relatives were permitted to prosecute in that court), and that the prisoner was the cause of his death; the prisoner, that he was innocent of the charge against him. Pott. Antiq. b. 1, c. 19.

(*r*) 4 Bl. Com. 348.

[by the peers of Great Britain, in the court of parliament, (or in the court of the lord high steward,)] when a peer is indicted of any felony. [Of this enough has been said in a former chapter (*s*): to which we shall only now add, that in the method and regulation of its proceedings, it differs but little from the trial, *per patriam* or by jury; except that no special verdict can be given in the trial of a peer (*t*), because the lords of parliament,—or the lord high steward, if the trial be had in his court,—are judges sufficiently competent of the law that may arise from the fact: and except, also, that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude and bind the minority (*u*).

V. The trial by jury or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the Great Charter (*x*): "*nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale judicium parium suorum, vel per legem terræ.*"

The antiquity and excellence of this trial, for the settling of civil property, has before been explained at large (*y*): and it will hold much stronger in criminal cases: since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the Sovereign and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the Crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and

(*s*) Vide sup. pp. 364, 367.
(*t*) Hatt. 116.
(*u*) Kelynge, 56; stat. 7 Will. 3, c. 3, s. 11; Foster, 247.
(*x*) 9 Hen. 3, c. 29.
(*y*) Vide sup. vol. III. pp. 593, 626.

[destructive to that very constitution, if exerted, without check or control, by justices of *oyer* and *terminer* occasionally named by the Crown; who might then imprison, despatch or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the Crown,] for any felony at least, unless upon an indictment; that is, the presentment or [preparatory accusation of twelve or more of his fellow-subjects (*z*): and that the truth of every accusation, whether preferred in the shape of indictment or information, should afterwards be] brought to trial and [confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion.]

[What was said of juries in general, and the trial thereby in *civil* cases (*a*), will greatly shorten our present remarks with regard to the trial of *criminal* suits, indictments and informations: which trial we shall consider in the same method that we did the former,—by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.]

When, therefore, a prisoner has pleaded *not guilty*, the next step is to impanel and swear for that purpose a jury,—called, (when intended to distinguish them from a grand jury,) a *petit* jury,—consisting of twelve persons, who are always to be of the same county where the indictment was found (*b*); and whose qualification, in other respects, is to be the same as that of jurors in civil causes (*c*); but it is a rule that none who was of the grand jury, by which the bill was found, is competent to

(*z*) The modern provisions under which larcenies in certain cases may be disposed of summarily before justices without indictment, are no innovation on this principle,—inasmuch as the consent of the person charged, or, in the case of a juvenile offender, of his parents or guardians, must be given before such course may be taken. Vide sup. pp. 395, 396.

(*a*) Vide sup. vol. III. p. 595.

(*b*) 2 Hale, P. C. 264; Hawk. P. C. b. 2, c. 40. As to the finding of the indictment, vide sup. pp. 422, 423.

(*c*) Vide sup. vol. III. p. 599, as to the qualification in respect of estate.

sit upon the petit jury (*d*). If the proceedings are before the Court of Queen's Bench, an interval elapses before the trial, during which process issues for summoning a jury, as in civil causes: [and the trial, in case of a misdemeanor, is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar (*e*);] which is invariably had when the prisoner is tried,—not in a court of oyer and terminer, or general gaol delivery (according to the usual course), but—in the Court of Queen's Bench, for any capital offence. But where the trial is in a court of oyer and terminer or general gaol delivery, the sheriff, (by virtue of a general precept directed to him beforehand by the judges of assize,) returns to the court, a panel of at least forty-eight jurors, to try all issues, whether criminal or civil, at that session (*f*): and therefore it is there usual, to try all felons immediately or soon after their arraignment. As to misdemeanors in the several courts last mentioned, or at the sessions of the peace, it was formerly not customary, (unless by consent of parties, or where the defendant was actually in gaol,) to try persons indicted thereof, at the same court in which they had pleaded *not guilty* to the indictment. It is now, however, provided by 14 & 15 Vict. c. 100, s. 27, that no person prosecuted, shall be entitled to *traverse* (or postpone) the trial of any indictment found against him at any session of the peace, of oyer and terminer, or of gaol delivery (*g*); but that if the court,—upon the application of such person or otherwise,

(*d*) 25 Edw. 3, st. 5, c. 3.

(*e*) On an information *ex officio*, the attorney-general is entitled to demand a trial at bar, if he thinks proper. 1 Chit. Cr. L. 848.

(*f*) 2 Hale, P. C. 263; 2 Arch. Just. 18. Et vide 6 Geo. 4, c. 50, s. 13; 7 Geo. 4, c. 64, s. 21; 15 & 16 Vict. c. 76, s. 105. The statute first cited (as to which vide sup. vol. III. p. 599) contains almost all the provisions now in force as to the qualification, &c. of jurors, both in civil and criminal cases.

(*g*) To *traverse* properly signifies to plead in denial (vide sup. vol. III. p. 573), and, therefore, in every case, a party who pleads not guilty to an indictment must also be said to traverse the indictment; but the meaning of the statute is, that his traverse shall not entitle him to a postponement. In the practice of the criminal courts, the word has been ordinarily thus used in connection with a postponement of the trial.

—shall be of opinion that he ought to be allowed a further time, either to prepare his defence or otherwise, such court may adjourn the trial to the next subsequent session, on such terms as to bail or otherwise, as shall seem meet; and may respite the recognizances of the prosecutor's witnesses accordingly. In misdemeanors, also, we may remark, that the trial may be by a *special* jury; according to the practice in civil actions (*h*): but this applies only to prosecutions in the Queen's Bench; and is not allowed before commissioners of oyer and terminer and gaol delivery, or at the sessions of the peace.

In connection with the subject of trial, we may remark here, that in the case of treason generally, (but with the exception of that for counterfeiting the royal seals or an attempt to assassinate the sovereign,) it is enacted by statute 7 Will. III. c. 3, that no person shall be tried for the same, or for any misprision thereof, unless the indictment be found within three years after the offence committed; and that the prisoner shall have the same compulsory process to bring in his witnesses *for* him, as was usual to compel their appearance *against* him. And by statutes of 7 Anne, c. 21 (*i*) (*j*), and 6 Geo. IV. c. 50, s. 21, the prisoner is in general entitled,—in case of treason and misprision thereof,—to have a copy of the indictment, and a list of the witnesses to be produced against him, and of the jurors, delivered to him ten days before the trial (*k*). But by 5 & 6 Vict. c. 51 (*l*), it is provided, that in all cases

(*h*) Vide 6 Geo. 4, c. 50, s. 30, &c.

(*i*) This Act, so far as it related to treason for counterfeiting the royal coin or seals, is repealed by 6 Geo. 3, c. 53, s. 3. By 2 Will. 4, c. 34, the offence of coining no longer amounts to treason.

(*j*) Extended now to Ireland, by 17 & 18 Vict. c. 26.

(*k*) See R. *v.* Frost, 2 Mood. C. C. 140. In all felonies (treason and misprision thereof excepted), the allowance of a copy of the indictment, and a list of the witnesses, is in the discretion of the court, though in practice they are always allowed both in the case of felonies and misdemeanors (1 Chit. Cr. L. 403); in the case of prosecutions for misdemeanors instituted by the attorney or solicitor-general, it is expressly required by 60 Geo. 3 & 1 Geo. 4, c. 4, s. 8, to be given to the party prosecuted, free of expense, on his application.

(*l*) Et vide 39 & 40 Geo. 3, c. 93.

of treason in compassing or imagining any bodily harm tending to the death or destruction, maiming or wounding, of the Queen, (and in all cases of misprision of any such treason,) where the overt act or acts shall be any attempt to injure in any manner whatsoever the person of the Queen,—the person charged shall be indicted, arraigned, tried, and attainted, in the same manner and according to the same course and order of trial in every respect, and upon the like evidence, as if he stood charged with murder; and that no indictment for such treason, shall be within any of the provisions of the said several acts of 7 Will. III., 7 Anne, or 6 Geo. IV. touching trials in cases of treason and misprision thereof; but that, upon conviction upon such indictment, judgment shall nevertheless be given, and execution done, as in other cases of treason. By 6 & 7 Will. IV. c. 114, and 11 & 12 Vict. c. 42, s. 27, it is also provided, that all persons held to bail, or committed to prison by justices of the peace for any indictable offence, shall be entitled, (upon payment at such reasonable rate as in the latter statute specified,) to copies of the depositions on which they have been so held to bail or committed:—and that all persons under trial may inspect all depositions taken against them, and returned into court, without fee or reward.

[When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve; unless they are challenged by the party.

Challenges may here be made, either on the part of the Crown, or that of the prisoner; and either to the whole array or to the separate polls; for the very same reasons that they may be made in civil cases (*m*). For it is here at least as necessary, as there, that the sheriff or returning officer be totally indifferent; and that the particular jurors should be *omni exceptione majores;* not liable to objection either *propter honoris respectum, propter defectum, propter affectum,* or *propter delictum* (*n*).] Besides which, the pri-

(*m*) Vide sup. vol. III. p. 596.

(*n*) Vide sup. vol. III. p. 601. By 6 Geo. 4, c. 50, s. 50, no man shall serve on a jury for the trial of a

[vilege formerly allowed to aliens in civil, as well as criminal cases, of challenging the array, on the ground that the sheriff has not returned a jury *de medietate linguæ*; that is, a jury one-half of which consisted of aliens, supposing so many to be found in the place; is still preserved by the express enactment of 6 Geo. IV. c. 50, s. 47 (*o*), in favour of persons indicted for felony or misdemeanor; which provides that, on the prayer of every alien so indicted or impeached, the sheriff (or other proper minister) shall, by command of the court, return for one-half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had; and if not, then so many aliens as shall be found in the same town or place, if any; and that no such alien juror shall be liable to be challenged for want of freehold or other qualification required by that Act; but that every such alien may be challenged for any other cause.

[Challenges upon any of the foregoing accounts, are styled challenges *for cause*; which may be without stint in both criminal and civil trials (*p*). But in criminal cases, or at least in] cases of felony (*q*), [there is, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all,—which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons: 1. As every man must be

capital offence, who shall not be qualified as a juror in civil causes within the same county, city or place.

(*o*) This Act repeals (s. 62) the former statutes on this subject, viz. 27 Edw. 3, st. 2, c. 8; 28 Edw. 3, c. 13, and 8 Hen. 6, c. 29. This privilege of aliens, we may remark here, was taken away in *treason*, by 1 & 2 P. & M. c. 10.

(*p*) Besides these challenges by the parties, the court itself is empowered to amend or enlarge the panels of jurors, by taking out the names of individuals and inserting others where necessary. (6 Geo. 4, c. 50, s. 20.) This Act, by sect. 62, repeals the former act of 3 Hen. 8, c. 12, on the same subject.

(*q*) Blackstone says that a peremptory challenge is allowed in "capital" felonies, *in favorem vitæ* (4 Bl. Com. 353). But the practice extends to all felonies, though not to misdemeanors. Co. Litt. 156 b.

[sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner, when put to] his defence [should have a good opinion of his jury,—the want of which might totally disconcert him, —the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, to set him peremptorily aside.

This privilege of peremptory challenges, though granted to the prisoner, is denied to the Crown] by 6 Geo. IV. c. 50, s. 29; which, (repealing and re-enacting the former Act of 33 Edw. I. st. 4, on the same subject,) provides that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. [However, it is held that the king need not assign his cause of challenge till all the panel is gone through; nor unless there cannot be a full jury without the persons so challenged (*r*). And then, and not sooner, the council for the Crown must show cause, otherwise the juror shall be sworn (*s*).

The peremptory challenges of the prisoner must, how-

(*r*) In the case of Mansell *v.* The Queen (in error), 26 L. J. Q. B. (M. C.) 137, the law, as here laid down by Blackstone, in vol. iv. p. 353, was confirmed;—the court observing, "But there was no intention "of taking away all power of "peremptory challenge from the "Crown, &c., and the course has in-"variably been to permit the Crown "to challenge without cause, till the "panel has been called over and ex-"hausted, and then to call over the "names of the jurors peremptorily "challenged by the Crown, and put "the Crown to assign cause, so that "if there are twelve jurors to whom "no just exception can be assigned "the cause may proceed," &c.

(*s*) Hawk. P. C. b. 2, c. 43, s. 3; 2 Hale, P. C. 271. And the practice is the same both in trials for misdemeanors and for capital offences. 3 Harg. St. Tr. 519.

[ever, have some reasonable boundary, otherwise he might never be tried. This reasonable boundary was settled by the common law to be the number of thirty-five: that is, one under the number of three full juries (*t*). For the law judged that five-and-thirty were fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenged a greater number, or three full juries, had no intention to be tried at all. And so the law still stands in the case of treason (*u*)], except in the case of any attempt to injure the person of the Queen (*x*). But by 6 Geo. IV. c. 50, s. 29 (repealing and re-enacting the former provision of 22 Hen. VIII. c. 14, on the same subject),—no person arraigned for murder or felony shall be admitted to any peremptory challenge above the number of twenty; and by 7 & 8 Geo. IV. c. 28, s. 3, if any person indicted for treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law to challenge in any of the said cases; every such peremptory challenge beyond the number allowed by law, shall be entirely void: and the trial of such person shall proceed as if no such challenge had been made.

[If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel,] a *tales* may be awarded (as in civil causes) (*y*): supposing the prosecution to be in the Queen's Bench; but if it be under a commission of gaol delivery, the course is for the court to order, *ore tenus*, a new panel to be returned *instanter* (*z*). When at last the proper number, free from all exception, are obtained, they are sworn; and the form of oath in cases of felony, or wherever the defendant appears

(*t*) 2 Hale, P. C. 269.

(*u*) This is by the effect of 1 & 2 P. & M. c. 10, s. 7. (See Hawk. P. C. b. 2, c. 43, s. 8.) As to the number of challenges allowed in misprision of treason generally, it seems doubtful. Vide Hawk. ubi sup. sect. 5.

(*x*) By 5 & 6 Vict. c. 51, there is to be in this case "the same course and order of trial in every respect" as in a charge of murder, vide sup. pp. 487, 488.

(*y*) Vide sup. vol. III. p. 602.

(*z*) 4 Inst. 168; 4 St. Tr. 728.

in person, is as follows: "You shall well and truly try, "and true deliverance make, between our sovereign lady "the Queen, and the prisoner whom you have in charge: "and a true verdict give according to the evidence. So "help you God."

[When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced, by the counsel for the Crown or prosecution.] And it was formerly a settled rule at common law, that no counsel should be allowed a prisoner upon his trial upon the general issue in any felony, unless some point of law should arise proper to be debated (*a*); though the judges made no scruple to allow a prisoner's counsel to instruct him what questions to ask, or even to ask questions for him with respect to matters of fact;] and as to matters of law, considered the prisoner as [*entitled* to the assistance of counsel.] And by 7 Will. III. c. 3, it was provided in the case of treason generally that he might make defence by counsel not exceeding two; and [the same indulgence was by 20 Geo. II. c. 30, extended to *parliamentary impeachments* for treason; which were excepted in the former Act.] But the state of the law on this subject is now governed by 6 & 7 Will. IV.

(*a*) Sir E. Coke (3 Inst. 137) gives this reason for the rule, "because "the evidence to convict a prisoner "should be so manifest as it cannot "be contradicted." And Lord Nottingham, when high steward, declared (3 St. Tr. 726), that this was the only good reason that could be given. The rule, however, was strongly disapproved by Blackstone; who remarks (vol. iv. p. 355), that however it may be palliated under cover of that noble declaration of the law, that the judge shall be counsel for the prisoner, it is not of a piece with the rest of the "humane treat- "ment of prisoners by the English "law."

Father Parsons, the Jesuit, and, after him, Bishop Ellys, (Of English Liberty, vol. ii. p. 66,) have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Henry the first; meaning, apparently, chapters 47 and 48, of the code which is usually attributed to that prince. "*De* "*causis criminalibus vel capitalibus* "*nemo quærat concilium: quin im-* "*placitatus statim perneget, sine omni* "*petitione concilii. In aliis omnibus* "*potest et debet uti concilio.*" But it may be doubted if this refers to the right to have counsel in court.

c. 114, which sets aside the antient rule altogether; and provides, that all persons tried for any felony may make full answer or defence by counsel; or, in courts where attornies practise, by attorney (*b*).

[The doctrine of evidence upon pleas of the Crown is, in most respects, the same as that upon civil actions.] There are, however, some leading points wherein a difference between civil and criminal evidence will be found to exist; and among them are the following (*c*):—

[First, in all cases of treason and misprision of treason, by statutes 1 Edw. VI. c 12; 5 & 6 Edw. VI. c. 11,] and 7 Will. III. c. 3, [*two* lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence *confess* the same (*d*):] and, by the last-mentioned statute, [it is declared, that both witnesses must be to the same overt act of treason; or one to one overt act, and the other to another overt act of the same species of treason (*e*), and not of distinct heads or kinds: and that no evidence shall be admitted to prove any overt act, not expressly laid in the indictment. And therefore in Sir John Fenwick's case, in King William's time,—where there was but one witness,—an Act of Parliament (*f*) was made on purpose to attaint him of treason; and he was executed thereon (*g*).] But by 5 & 6 Vict. c. 51 (*h*), when the overt act alleged is an attempt to injure the person of the

(*b*) The allowance of counsel, is said by Blackstone, (vol. iv. p. 355,) to have been the rule also of the more antient common law; and he cites the Mirror, c. 3, s. 1.

(*c*) Besides the differences which here follow, it is to be remarked that many new rules of evidence have now been introduced by 17 & 18 Vict. c. 125, (The Common Law Procedure Act, 1854,) and that these seem not to apply to criminal, but only to civil cases. (See sects. 103, 105.) They will be found successively noticed in vol. III. pp. 604—618, with a reference to the proper section of this statute, at every place where such notice occurs.

(*d*) An exception to this is made by 1 & 2 P. & M. c. 10, in the case of treasons in counterfeiting the royal seals or signature.

(*e*) See St. Tr. vol. ii. p. 144; Foster, 235.

(*f*) Stat. 8 Will. 3, c. 4.

(*g*) St. Tr. vol. xi.

(*h*) Et vide 39 & 40 Geo. 3, c. 93.

Queen, the conviction may be supported by the like evidence as if the prisoner stood charged with murder; and the rule requiring two witnesses, is consequently set aside. In prosecutions for perjury, also, there can be no conviction except on the oath of two witnesses: though it will be sufficient that the perjury be directly proved by one witness; and that corroborative evidence, on some particular point, be given by another (*i*); and where the alleged perjury consists in the defendant's having contradicted what he himself swore on a former occasion, the testimony of a single witness in support of the defendant's own original statement will support a conviction (*k*). But, [in almost every other accusation, the oath of one positive witness will be sufficient:] the exception from the ordinary rule, in treason, being allowed, in order to secure the subject more effectually from false accusation in a case so penal; and where there may be danger of his being made the victim of political oppression: in perjury, because it would not be reasonable to convict, where there is only one oath against another (*l*).

Secondly, a confession of his guilt by the defendant, is in general sufficient to support a conviction. But this is only on the supposition that it is freely and voluntarily made; for otherwise, it is not even admissible in evidence. If drawn from him, therefore, by means of any threat or

(*i*) See R. *v.* Mayhew, 6 Car. & P. 315; R. *v.* Yates, ibid. 132; R. *v.* Parker, 1 Car. & M. 639.

(*k*) R. *v.* Harris, 5 B. & Ald. 929.

(*l*) 4 Bl. Com. 357; see R. *v.* Muscot, 10 Mod. 194; Champney's case, 2 Lewin, C. C. 258. Montesquieu lays it down, (Sp. L. b. 12, c. 3,) that those laws which condemn a man to death, *in any case*, on the deposition of a single witness, are fatal to liberty; and he adds this reason,—that the witness who affirms, and the accused who denies, make an equal balance; and that there is a necessity, therefore, to call in a third man to incline the scale. "But this," says Blackstone (vol. iv. p. 357), "seems to be carrying matters "too far; for there are some crimes "in which the very privacy of their "nature excludes the possibility of "having more than one witness. "Neither, indeed," he adds, "is the "bare denial of the person accused, "equivalent to the positive oath of "a disinterested witness."

promise, it cannot, in general, be received (*m*); and it is in no case evidence, except against himself (*n*). It is also a rule that if any part of a confession is used to establish the case on the part of the prosecution, the whole of it must be given in evidence; though the jury are at liberty to believe those parts which make against the defendant, and to disbelieve what he alleges in his own favour (*o*).

Thirdly, the deposition of witnesses before magistrates,—if duly taken according to the provisions of 11 & 12 Vict. c. 42, s. 17,—may be produced at the trial, and given in evidence against the defendant, if the party who made the deposition is dead, or so ill as not to be able to travel (*p*).

Fourthly, though by the general rule of law, all hearsay evidence,—that is, all statements not made in court, and upon oath,—are excluded; yet on a charge of homicide, it is the practice to admit in evidence the dying declarations of the deceased, with respect to the cause of his death,—provided they appear to have been made under a sense of his approaching dissolution (*q*).

Fifthly, though by 16 & 17 Vict. c. 83, the husband or

(*m*) See Reg. *v.* Luckhurst, 1 Dearsley's C. C. R. 245; R. *v.* Sleeman, ibid. 249. As to the statement, however, of a person charged before a magistrate, when brought before him for examination, vide sup. pp. 416, 417. Where such statement is made after his receiving the caution there mentioned, it is expressly provided by 11 & 12 Vict. c. 42, s. 18, that it may be given in evidence against him. See also an exception in the case of *gaming-houses*, noticed sup. pp. 340, 341; and in the case of bankruptcy, sup. vol. II. p. 160. As to the last of which exceptions, see Sloggett's case, 1 Dearsley's C. C. R. 656.

(*n*) See also 7 Geo. 4, c. 64, by which provisions were previously made on the same subject, and which 11 & 12 Vict. c. 42, only repeals in part.

(*o*) R. *v.* Clewes, 4 Car. & P. 221.

(*p*) See R. *v.* Scaife and others, 20 L. J. (M. C.) 229; Queen *v.* Upton, St. Leonard's, 10 Q. B. 827; Queen *v.* Clements, 30 L. J. (M. C.) 193; Reg. *v.* Beeston, 1 Dearsley's C. C. R. 405. So the depositions may be used if the witness be insane or kept away by the prisoner, see Austin's case (per Willes, J.), 1 Dearsley's C. C. R. 612.

(*q*) See as to dying declarations, R. *v.* Mosley, 1 R. & M. C. C. R. 97; R. *v.* Van Butchell, 3 Car. & P. 629; R. *v.* Hayward, 6 Car. & P. 157; R. *v.* Perkins, 9 Car. & P. 395; R. *v.* Scaife, 1 M. & Rob. 551. See also Taylor on Evidence, p. 567, 2nd edit.

wife of any party to a legal proceeding, is now in general competent and compellable to give evidence on behalf of either or any of the parties, yet it is also thereby expressly provided that this is not to extend to compel or enable a husband to give evidence for or against his wife, or a wife to give evidence for or against her husband, in any criminal proceeding (*r*); and before this statute such evidence was in general, as it still is, inadmissible. Yet this has been always open to certain exceptions. Thus, in treason, a wife may give evidence against her husband, because the tie of allegiance is paramount to all others (*s*). So upon a charge of forcible abduction and marriage, or other violence to her person, the woman is a competent witness against her husband (*t*).

Sixthly, [it was an antient and commonly received practice (*u*), derived from the civil law, and which also has obtained in France (*x*), that as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered, to the honour of Mary the first, whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous,—that when she appointed Sir Richard Morgan chief justice of the Common Pleas, she enjoined him, "that notwithstanding the old error, which "did not admit any witnesses to speak, or any other matter "to be heard, in favour of the adversary, her majesty being "party;—her highness's pleasure was, that whatsoever "could be brought in favour of the subject, should be ad- "mitted to be heard; and moreover, that the justices

(*r*) Vide sup. vol. II. p. 272.

(*s*) 1 Chit. Bl. 444, n. There seems to be an exception, however, in the case of an attempt to injure the person of the Queen; for in that case, by 5 & 6 Vict. c. 51, the defendant is to be "tried upon the "like evidence as if charged with "murder." Vide sup. pp. 487, 488.

(*t*) Ibid.; 1 Phil. Ev. 71; Lord Audley's case, St. Tr.

(*u*) St. Tr. i. *passim.*

(*x*) Domat, Publ. Law, b. 3, tr. 1; Montesq. Sp. L. b. 39, c. 11.

["should not persuade themselves to sit in judgment "otherwise for her highness than for her subjects (y)." Afterwards, in one particular instance,—(when embezzling the royal stores was made a felony (z),)—it was provided, that any person impeached for such felony "should be received and admitted to make any lawful "proof that he could, by lawful witnesses or otherwise, "for his discharge and defence;" and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was generally introduced of examining witnesses for the prisoner, but not upon oath (a); the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the Crown. Sir Edward Coke (b), protests very strongly against this tyrannical practice: declaring, that he never read in any Act of parliament, book, case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and that therefore there was not so much as *scintilla juris* against it (c). And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland (d),—when felonies committed by Englishmen in Scotland, were ordered to be tried in one of the three northern counties,—they insisted on a clause, and carried it against the efforts of both the Crown and the house of lords (e),—against the practice of the courts in England, and the express law of Scotland (f);—that in all such trials, for the better discovery of the truth, and the better information of the consciences of the jury and justices, "there shall be allowed to the party arraigned the benefit "of such credible witnesses, to be examined upon oath,

(y) Hollingsh. 1112; St. Tr. i. 72.

(z) This was by 31 Eliz. c. 4, a statute repealed by 7 & 8 Geo. 4, c. 27. As to this offence, vide sup. p. 263.

(a) 2 Bulst. 147; Cro. Car. 292.

(b) 3 Inst. 79.

(c) See also 2 Hale, P. C. 283, and his Summary, 264.

(d) Stat. 4 Jac. 1, c. 1.

(e) Com. Journ. 4, 5, 12, 13, 15, 29, 30 Jun. 1607.

(f) 4 Jun. 1607.

["as can be produced for his clearing and justification." At length by the statute 7 Will. III. c. 3, the same measure of justice was established throughout all the realm, in cases of] high treason causing any corruption of blood, and of misprision thereof: [and it was afterwards declared, by statute 1 Anne, st. 2, c. 9, that in all cases of treason and felony, all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him.]

Lastly, the defendant in a criminal prosecution, is allowed to call witnesses to speak, generally, to his character; though he is not allowed to prove particular actions bearing favourably on his character; unless they happen to stand in connection with some of the facts, charged and proved against him. And by 6 & 7 Will. IV. c. 111, and 14 & 15 Vict. c. 19, s. 9, where, upon any indictment for felony, or for certain misdemeanors, a previous conviction for another offence is stated, though in general the reading of that part which relates to the former conviction is to be deferred till the jury have found the prisoner guilty of the subsequent offence,—yet if he gives evidence as to character, the prosecutor may in answer thereto give evidence of the previous conviction, before the subsequent offence is found; and the jury shall inquire of the previous conviction and subsequent offence, at the same time.

[When the evidence on both sides is closed,—and indeed when any evidence hath been given,—the jury cannot be discharged, (unless in cases of evident necessity (*g*),) till they have given in their verdict: but are to consider of it, and deliver it in, with the same forms as upon civil causes (*h*). But the judges may adjourn, while the jury are withdrawn to confer, and return to receive the verdict in

(*g*) Co. Litt. 227; 3 Inst. 110; Foster, 27; Gould's case, Hil. 1764.

(*h*) As to the verdict in civil causes, vide sup. vol. III. p. 621—627. Blackstone here notices (vol. iv. p. 360), as one point upon which the practice relative to verdict varies from that in civil causes, that the jury cannot "in a criminal case, "which touches life or member, give "a *privy* verdict." As to which, vide sup. vol. III. p. 624, n. (*f*).

[open court (*i*).] And when the trial runs to such a length, that it cannot be concluded in one day, the established practice now is to adjourn the court till the next morning; but the jury must be somewhere kept together, so that they may have no communication except with each other (*k*). Such verdict [may be either general, as guilty, or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court (*l*); whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they *doubt* the matter of law, and therefore *choose* to leave it to the determination of the court: though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict,—if they think proper so to hazard a breach of their oaths. But the practice some time in use, of fining, imprisoning, or otherwise punishing jurors, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal: and is treated as such by Sir Thomas Smith, two hundred years ago; who accounted such doings "to be very violent, tyrannical, and "contrary to the liberty and custom of the realm of "England (*m*)." For, as Sir Matthew Hale well observes (*n*), it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions: unhappy also for the prisoner; for if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances (*o*), where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside; and a new trial granted by the Court of Queen's Bench (*p*). But there hath yet been no in-

(*i*) 3 St. Tr. 731; 4 St. Tr. 231, 455, 485.

(*k*) Stone's case, 6 T. R. 527; 1 Chit. C. L. 632.

(*l*) See an example of a special verdict in an indictment for a nuisance, R. *v*. Tindall, 6 A. & E. 143.

(*m*) Smith's Commonw. l. 3, c. 1.

(*n*) 2 Hale, P. C. 313.

(*o*) R. *v*. Read, 1 Lev. 9; T. Jones, 163; St. Tr. x. 416.

(*p*) As to the grounds on which it will be granted, see Reg. *v*. Whitehouse, 1 Dearsley's C. C. R. 1.

[stance of granting a new trial, where the prisoner was found *not* guilty on the first (q).

If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation (r). And upon such his *acquittal*,—or upon his discharge for want of prosecution, or upon the bill of indictment not being found by the grand jury,—he shall be immediately set at large, without payment of any fee to the gaoler (s). But if the jury find him guilty (t), he is then said to be *convicted* of the crime whereof he stands indicted. Which conviction, therefore, may accrue two ways, either by his confessing the offence, and pleading guilty; or by his being found so by the verdict of his country.]

With such conviction of the offender two collateral circumstances are connected—first, the allowance of the expenses of the prosecutor; and secondly, in case of larceny, the restitution of his goods.

1. By 7 Geo. IV. c. 64, and 14 & 15 Vict. c. 11, c. 19, and c. 55, the court is empowered in all cases of felony, and upon indictments for certain misdemeanors, to allow the expenses of the prosecutor (u) and his witnesses,—with

(q) Vide Hawk. P. C. b. 2, c. 47, s. 11. But a new trial in favour of the Crown, will sometimes be granted in a *penal action*. See Attorney-General *v.* Rogers, 11 Mee. & W. 670.

(r) The civil law in such case only discharges him from the same accuser, but not from the same accusation. Ff. 48, 2, 7, s. 2.

(s) See 14 Geo. 3, c. 20; 55 Geo. 3, c. 50; 8 & 9 Vict. c. 114; R. *v.* Coles, 8 Q. B. 75. In the particular instance of a person tried and acquitted at the Central Criminal Court for an offence not alleged to have been committed by him within its jurisdiction, the judges of the court may order him to be reimbursed, by the Treasury, the expense to which he has been thereby put,—out of the monies provided by parliament for law charges in England. (19 & 20 Vict. c. 16, s. 26)

(t) In the Roman republic, when the prisoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was something particularly delicate; not that he was guilty, but that he had not been enough upon his guard: "*parum cavisse videtur*." Festus, 325.

(u) We may remark here, that

compensation for their trouble and loss of time (*x*); and this whether the case shall terminate in conviction or acquittal, or in the throwing out the bill of indictment; and even though no bill of indictment shall have been actually preferred (*y*). The misdemeanors included in the statute of George the fourth are as follows;—an assault with intent to commit felony; an attempt to commit felony; a riot; a misdemeanor for receiving stolen property knowing the same to have been stolen; an assault upon a peace officer in the execution of his duty, or any person acting in his aid; a neglect or breach of duty as a peace officer; an assault committed in pursuance of a conspiracy to raise the rate of wages; the knowingly obtaining any property by false pretences; the wilful and indecent exposure of the person; and wilful and corrupt perjury, or subornation of perjury. And to these are added, by 7 Will. IV. & 1 Vict. c. 44, the concealment by a woman of the birth of her child (*z*);—by 10 & 11 Vict. c. 82, charges against juvenile offenders (*a*);—by 13 & 14 Vict. c. 101, assaults

costs are also in some cases allowed to defendants; for by 4 & 5 W. & M. c. 18, if the prosecutor, on an information filed by the Master of the Crown office, does not try within a year after issue joined, or if the defendant be acquitted by verdict, or a *nolle prosequi* be entered; the Court of Queen's Bench may award costs to the defendant,—unless the judge before whom it is tried certifies in open court on the trial, that there was a reasonable ground for the prosecution. And it may be also noticed, that in cases where a prisoner is tried at the Central Criminal Court under 19 & 20 Vict. c. 16, the Court of Queen's Bench, or any judge thereof, may issue a certificate, on which the Treasury may pay a sum not exceeding 20*l.* to enable him to defray the charges and expenses of his witnesses. (19 & 20 Vict. c. 16, s. 25.)

(*x*) By 7 Geo. 4, c. 64, the court of quarter sessions might make regulations as to the amount of the costs and expenses to be allowed: but by 14 & 15 Vict. c. 55, s. 4, this subject is placed under the superintendence of the secretary of state; and the costs of prosecutions, being charged in the first instance upon the county rate, are repaid to the treasurer of the county out of the "Consolidated fund." See 15 & 16 Vict c. 82.

(*y*) By 7 Geo. 4, c. 64, s. 28, the court may also order compensation to parties who have been active in the apprenhension of certain offenders. Vide sup. p. 414.

(*z*) As to this offence, vide sup. p. 350.

(*a*) Vide sup. p. 394.

on workhouse or relieving officers in the due execution of their duty, or any persons acting in their aid;—by 14 & 15 Vict. c. 11 and c. 19, misdemeanors committed under those Acts (*b*) respectively;—by 14 & 15 Vict. c. 55 (*c*), the abuse of girls above ten and below twelve years of age; the abduction of an unmarried girl under the age of sixteen; and a conspiracy to commit any felony, or to charge or indict any person for a felony;—by 18 & 19 Vict. c. 126, charges summarily adjudicated on, or offenders convicted on a plea of "guilty," under the provisions thereof (*d*);—by 19 &20 Vict. c. 16, indictments or inquisitions transmitted, or removed for trial, to the Central Criminal Court, by order of the Court of Queen's Bench;—and by 20 & 21 Vict. c. 54, misdemeanors against that Act (*e*).

2. [By the common law there was no restitution of goods upon an indictment, because it is at the suit of the Crown only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again (*f*).] But afterwards, by statute 21 Hen. VIII. c. 11, where any person was convicted of larceny, by the evidence of the party robbed, he was to have full restitution of his money, goods and chattels,—or the value of them out of the offender's goods, (if he had any,)—by a writ to be granted by the justices; and latterly, it has been the practice for the court, [upon the conviction of a felon, to order, without any writ, immediate restitution of such goods as are brought into court, to be made to the several prosecutors (*g*).] As to which restitution upon conviction, it

(*b*) Vide sup. pp. 152, 163, 164, 173, 180.

(*c*) Vide sup. pp. 155, 160.

(*d*) Vide sup. p. 395.

(*e*) Vide sup. p. 202.

(*f*) 3 Inst. 242. As to an appeal, vide sup. p. 431.

(*g*) Even without any award of restitution, the party may peaceably retake his goods wherever he happens to find them, unless a new property have been fairly acquired therein. He may also bring an action against the felon after conviction, in case he receives a pardon. But such action lies not before conviction; for so felonies would be made up and healed; and also recaption is unlawful, if done with intention to smother or compound the

is observable, that it [reaches the goods so stolen, notwithstanding the property of them is endeavoured to be altered by sale in a market overt (*h*);] a doctrine on which Blackstone remarks, that [though it may seem somewhat hard on the buyer, yet the rule of the law is, that *spoliatus debet, ante omnia, restitui*; especially when he has used all the diligence in his power to convict the felon. And since the case is reduced to this hard necessity, that either the owner or the buyer must suffer, the law prefers the right of the owner,—who has done a meritorious act by pursuing a felon to condign punishment,—to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction.] The statute of 21 Hen. VIII. is repealed (*i*); but a writ or order of restitution, may now be issued under the provision of 7 & 8 Geo. IV. c. 29, s. 57; which enacts, that if any person, guilty of any felony or misdemeanor under that Act, in stealing, taking, obtaining or converting, or in knowingly receiving any chattel, money, valuable security, or other property, shall be indicted for the same, by or on behalf of the owner, his executor or administrator, and be convicted thereof,—the property shall, in such case, be restored to the owner or such his representative; and the court shall have power to award, from time to time, writs of restitution for such property (*j*), or to order the restitution thereof in a summary manner (*k*). This, however, is sub-

larceny. (4 Bl. Com. 363.) As to recaption, vide sup. vol. III. p. 336. As to compounding offences, vide sup. p. 299.

(*h*) 1 Hale, P. C. 543; 4 Bl. Com. 363.

(*i*) By 7 & 8 Geo. 4, c. 27.

(*j*) Even without a writ or order for restitution, the owner of a stolen chattel may, after conviction of the thief, bring an action of trover for it against a person who has bought it in market overt. (Scattergood *v.* Sylvester, 15 Q. B. 506.) As to sales in market overt, vide sup. vol. II. p. 71.

(*k*) A similar power is given to the *justices of the peace*, on their summarily convicting a juvenile offender of larceny, under the provisions of 10 & 11 Vict. c. 82; 13 & 14 Vict. c. 37; or on their exercising the summary jurisdiction conferred on them in certain cases of larceny, &c., by 18 & 19 Vict. c. 126.

ject to a proviso as to valuable securities, that if before the award of restitution, it shall appear that they shall have been *bonâ fide* paid or discharged by some person liable to the payment thereof; or, (being negotiable instruments,) shall have been *bonâ fide* taken by transfer or delivery, by some person for a just and valuable consideration; without any notice or reasonable cause to suspect that they had been taken or converted by any felony or misdemeanor;—in either of such cases no restitution shall be awarded.

CHAPTER XXIII.

OF JUDGMENT AND ITS CONSEQUENCES.

We are now to consider the next stage of criminal prosecutions after trial and conviction are past,—which is that of *judgment*. For when, upon a charge of felony, the jury have brought in their verdict, guilty, in the presence of the prisoner, [he is either immediately, or at a convenient time soon after, asked by the court, if he has anything to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor, (the trial of which may and does usually happen in his absence,) a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry;] but no corporal punishment can in any case be awarded against a defendant, unless he be personally present (*a*). [But whenever he appears in person, he may at this period offer any exceptions to the indictment, in *arrest of judgment*) *b*);] as for some defect

(*a*) Hawk. P. C. b. 2, c. 48, s. 17. The defendant must in all cases be personally before the court in order to move in arrest of judgment. (Com. Dig. Indictment, N.) And to enable him to do so, he must, in capital cases, be asked before judgment, "what he has to say why "judgment of death should not be "pronounced against him." Ibid.

(*b*) At this period of the proceedings it was, that the prisoner formerly might avoid a judgment of death, by praying the *benefit of clergy*; it being more usual to resort to this, after conviction, than by way of declinatory plea to the indictment (as to which vide sup. p. 464, n. (*e*)). This benefit of clergy constituted, in former times, so remarkable a feature in our criminal law, and a general acquaintance with its nature is still so important for the illustration of our books; that it may be desirable to subjoin here some further notice on the subject. It originally con-

apparent on the face of the record: for it is to defects of that kind only, that the motion in arrest of judgment applies. Formerly, indeed, the judgment might be arrested for merely formal defects, as for want of sufficient certainty in setting forth the person, the time, or the place; but now, as we have seen (*c*), defects of a merely formal kind

sisted, in the privilege allowed to a clerk in orders, when prosecuted in the temporal court, of being discharged from thence, and handed over to the Court Christian, in order to make canonical purgation,—that is, to clear himself on his own oath, and that of other persons as his compurgators; (vide Reeves's Hist. Eng. L. vol. 2, pp. 14, 134; 25 Edw. 3, st. 3, c. 4; and as to canonical purgation, sup. p. 13): a privilege founded, as it is said, upon the text of Scripture, "Touch not mine "anointed, and do my prophets no "harm." In England, this was extended by degrees to all who could read, and so were capable of becoming clerks; and ultimately allowed by 5 Ann. c. 6, without reference to the ability to read. (Reeves, ubi supra, et vol. 4, p. 156; 2 Inst. 637; 1 Edw. 6, c. 12.) But by 4 Hen. 7, c. 13, it was provided, that laymen allowed their clergy should be burned in the hand, and should claim it only once; and as to the clergy,—it became the practice, in cases of heinous and notorious guilt, to hand them over to the ordinary *absque purgatione faciendâ*, the effect of which was that they were to be imprisoned for life, (4 Bl. Com. 369;) although afterwards, by 18 Eliz. c. 7, the delivering over to the ordinary, was abolished altogether. As to the nature of the offences to which the benefit of clergy applied, it had no application except in capital felonies; and from the more atrocious of these it had been taken away by various statutes, prior to its late entire abolition by 7 & 8 Geo. 4, c. 28, s. 6. As the law stood at the time of that abolition, clerks in orders were, by force of the benefit of clergy, discharged in clergyable felonies without any corporal punishment whatever, and as often as they offended (2 Hale, P. C. 375); the only penalty being a forfeiture of their goods; and the case was the same with peers and peeresses, as regards the first offence; and even after the 7 & 8 Geo. 4, c. 28, doubts were entertained whether the privilege of lords or peers in parliament in this respect did not still exist; which led to the passing of 4 & 5 Vict. c. 22, enacting that, upon conviction for any felony, such persons shall be punishable as any other of her majesty's subjects. As to commoners, also, they could have benefit of clergy only for the first offence; and they were discharged by it from the capital punishment only,—being subject on the other hand, by 3 Geo. 1, c. 11, 6 Geo. 1, c. 23, and 19 Geo. 3, c. 74, not only to forfeiture of goods, but to burning in the hand, whipping (except in manslaughter), fine, imprisonment, or, in certain cases, transportation, in lieu of the capital sentence. 4 Bl. Com. p. 371.

(*c*) Vide sup. p. 428—439.

are, in some cases, wholly immaterial; and, in none, are allowed to be brought forward, except by way of demurrer or motion to quash the indictment: so that a motion in arrest of judgment, can be now made only in respect of some substantial objection (*d*). Upon such motion, if the objection taken appear to be sufficient, the court will arrest the judgment; that is, abstain from pronouncing any judgment, and discharge the prisoner: or, supposing the trial to be in a court of oyer and terminer, gaol delivery, or quarter sessions, and any question of law to arise on such motion, (or even independently of such motion,) which it finds too difficult for its determination,—the court is now empowered by 11 & 12 Vict. c. 78, to *reserve* the question; and to state it in the form of a special case for the consideration of the judges of the superior courts (*e*); and in the meantime to postpone the judgment, or respite the execution of it, as may be thought fit. It is to be observed, however, that, even supposing the judgment to be arrested, it is not, like an acquittal by verdict, an absolute discharge from the matter of accusation, for the party may be indicted again (*f*).

[A *pardon* also, as has been before said (*g*), may be pleaded in arrest of judgment, and it has the same advantage when pleaded here, as when pleaded upon arraignment, viz. the saving the attainder. And, certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible.]

[If all these resources fail, the court must pronounce *judgment* (*h*);] that is, award the punishment [which the

(*d*) An instance of the kind of objection which can still be made in arrest of judgment, is where, in a count for receiving stolen goods, there is no allegation that the person charged knew they were stolen. (see Larkin's case, 1 Dears. C. C. R. 365.)

(*e*) The judges, when sitting to dispose of special cases on questions reserved, are sometimes spoken of as the "Court of Criminal Appeal," and the term has been adopted in the 16 & 17 Vict. c. 30. (See sect. 4.) As to the course of practice to be observed on the hearing of such special case, see Reg. Gen. 1st June, 1850.

(*f*) 4 Rep. 45.

(*g*) Vide sup. p. 471.

(*h*) By 4 Geo. 4, c. 48, whenever any person shall be convicted of any

[law hath annexed to the crime; and which hath been constantly mentioned, together with the crime itself, in the course of the former chapters;] and such judgment ought regularly (as in civil cases) to be *recorded*. The punishment of offences is in some cases governed by the common law only, but is more frequently defined by statute. In misdemeanors, it is generally fine or imprisonment, or both; and these are the ordinary punishments of the common law for a misdemeanor, where no other is provided: in felonies, it is, in some instances, death, but usually imprisonment or penal servitude: the imprisonment being frequently accompanied, both in misdemeanor and felony, by whipping (*i*). And every felony, for which no other punishment is provided, is punishable with penal servitude for not more than seven or less than three years; or with imprisonment for not more than two years (*j*): and to such imprisonment may be added, at the discretion of the court, hard labour and solitary confinement, and (in the case of males) whipping (*k*). And if any person shall be convicted of any felony not punishable with death, committed after

felony, except murder, (which exception is now abolished by the effect of 6 & 7 Will. 4, c. 30,) and shall by law be excluded the benefit of clergy in respect thereof, and the court before whom he is convicted shall be of opinion that under the particular circumstances of the case, he is fit to be recommended to the royal mercy, the court may abstain from pronouncing judgment of death, and instead of pronouncing it, only order it to be *recorded*; which being entered on record, is to have the same effect as if the judgment had been pronounced, and the offender reprieved. By 7 Will. 4 & 1 Vict. c. 77, there is a like provision as to conviction in the Central Criminal Court.

(*i*) The punishment of *whipping* (in the case of male offenders) is authorized in various cases of felony and misdemeanor, by the statute law. It was also inflicted, at common law, on persons of inferior condition, who were guilty of petit larceny, and other smaller offences, but it seems that by the usage of the Star Chamber, it was never to be inflicted on a gentleman (1 Chit. C. L. 796.) Blackstone enumerates also (vol. iv. p. 377) the *pillory*, the *stocks*, and the *ducking stool*, as ignominious punishments known to the English law. But the first of these is abolished by 7 Will. 4 & 1 Vict. c. 23, and the two last are disused.

(*j*) 7 & 8 Geo. 4, c. 28, s. 8; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*k*) 7 & 8 Geo. 4, c. 28, s. 8.

a previous conviction for felony, such person, on the subsequent conviction, is liable to penal servitude for life, or for a term of not less than three years, or to imprisonment for not less than four years, and, if a male, may be whipped in addition to the imprisonment (*l*),—but if the subsequent conviction be for *larceny*, the offender may be punished by penal servitude for not less than four or more than ten years (*m*). Moreover, in all cases where the court is empowered or required by any statute to award a sentence of penal servitude exceeding seven years, it is lawful for such court, at its discretion, to award a sentence of penal servitude for a term not less than seven years, or to award such a sentence of imprisonment for any period not exceeding two years, with or without hard labour, as the court shall think just under all the circumstances (*n*).

In cases punishable at common law, the judge has a discretion whether fine or imprisonment, or both, shall be awarded, and the measure of either is also left to his decision; and where the punishment is fixed by statute, there is also usually reposed in him, in cases of felony, a discretion between imprisonment and penal servitude; and in case both of felony and misdemeanor, (where either of these modes of punishment is adopted,) a power of determining, within certain limits at least, the period of its duration (*o*). The judge, however, cannot award either

(*l*) 7 & 8 Geo. 4, c. 28, s. 11; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

(*m*) 16 & 17 Vict. c. 99, s. 12. It may be questionable, (on reading this provision, together with those of 7 & 8 Geo. 4, c. 28, s. 11, and 20 & 21 Vict. c. 3,) whether the *minimum* term of penal servitude is intended to be three or four years, in a case where the subsequent conviction is for larceny.

(*n*) 9 & 10 Vict. c. 24; 20 & 21 Vict. c. 3.

(*o*) Whenever sentence is passed for felony, on a person already imprisoned under sentence for another crime, the court may award imprisonment for the subsequent offence, to commence from the expiration of the first imprisonment (7 & 8 Geo. 4, c. 28, s. 10); and where a person is already under sentence either of imprisonment or penal servitude, the court, (if empowered to sentence to penal servitude,) may award such sentence for the subsequent offence, to commence at the expiration of the first imprisonment or penal ser-

death or penal servitude, for any offence to which such punishment is not specifically made applicable by the law itself; and by the Bill of Rights (*p*) it is declared as one of the antient rights and liberties of the subjects of this realm, that no cruel and unusual punishments are to be inflicted. Some further remarks on those that have been mentioned, may here be material.

As to *fines*, their *quantum* [neither can or ought to be ascertained, by any invariable law. The value of money itself changes from a thousand causes; and at all events what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the Twelve Tables at Rome fined every person, who struck another, five-and-twenty denarii: this, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomsoever he pleased, and then tender them the legal forfeiture. Our statute law has not, therefore, often ascertained the quantity of fines, nor the common law ever,—it directing such an offence to be punished by fine in general, without specifying the certain sum,—which is fully sufficient when we consider that, however unlimited the power of the court may seem, it is far from being wholly arbitrary, but its discretion is regulated by law.] For the Bill of Rights,—which, as just mentioned, prohibits cruel and unusual punishments,—also particularly declares that excessive fines shall not be imposed (*q*): [and the same statute further declares, that all grants and promises of fines and forfeitures of particular

vitude; and this, although the aggregate term of imprisonment or penal servitude, respectively, may exceed the term for which either punishment could otherwise be awarded. (7 & 8 Geo. 4, c. 28, s. 10; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.)

(*p*) 1 W. & M. sess. 2, c. 2.

(*q*) When the judges imposed a fine of 30,000*l*. on the Duke of Devonshire, for striking within the limits of one of his majesty's palaces, the house of lords determined that their conduct was oppressive and illegal. 11 Harg. St. Tr. 136; et vide as to Oates's case, 4 Harg. St. Tr. 106.

[persons, before conviction, are illegal and void: since thereby many times undue means and more violent persecution would be used for private lucre, than the quiet and just proceeding of law would permit.

The reasonableness of fines in criminal cases has also been usually regulated by the determination of *Magna Charta*, c. 14, concerning amercements for misbehaviour by the suitors in matters of civil right. "*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti, salvo contenemento suo; et mercator eodem modo, salvâ mercandisâ suâ; et villanus eodem modo amercietur, salvo wainagio suo.*" A rule that obtained even in Henry the second's time (*r*); and means only that no man shall have a larger amercement imposed upon him than his circumstances or estate will bear; saving to the land-owner his contenement (*s*) or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the Great Charter also directs, that the amercement, which is always inflicted in general terms ("*sit in misericordiâ*"), shall be set, *ponatur*, or reduced to a certainty, by the oath of good and lawful men of the neighbourhood. Which method of liquidating the amercement to a precise sum, was usually performed in the superior courts (*t*) by the assessment or *affeerment* of the coroner, a sworn officer chosen by the neighbourhood,—under the equity of the statute of Westm. 1, c. 18; and then the judges estreated

(*r*) Glanv. b. 9, c. 8, s. 11.

(*s*) Lord Coke says, "that *contenement* signifieth his *countenance*, "as the armour of a soldier is his "countenance, the books of a scholar "his countenance, and the like."—(2 Inst. 28.) He adds, that "the "*wainagium* is the countenance of "the villain; and it was great reason "to save his wainage, for otherwise "the miserable creature was to carry "the burthen on his back." (Christian's Blackstone.)

(*t*) In the court leet and court baron it is performed by *affeerors*, or suitors sworn to *affeere*; that is, tax and moderate the general amercement, according to the particular circumstances of the offence and the offender. The affeeror's oath is conceived in the very terms of *Magna Charta*. As to which, Blackstone (vol. iv. p. 380) cites Fitz. Survey, c. 11.

[them into the Exchequer (*u*). Amercements imposed by the superior courts on their own officers and ministers, were affeered by the judges themselves; but when a pecuniary mulct was inflicted by them on a stranger to,] or person not being an officer of, the court (*x*), [it was then denominated a *fine;* and the antient practice was, when any such fine was imposed, to inquire, by a jury, "*quantum inde regi dare valeat per annum, salvâ sustentatione suâ, et uxoris, et liberorum suorum* (*y*)." And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay without touching the implements of his livelihood; but to inflict corporal punishment, or a limited imprisonment, instead of such fine as might amount to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms; because the penalty must otherwise fall upon a man's person unless it be redeemed or ransomed by a pecuniary fine (*z*): according to an antient maxim, *qui non habet in crumenâ luat in corpore.* Yet, where any statute speaks both of fine and ransom, it is holden that the ransom shall be treble the fine at least (*a*).]

As to *imprisonment* (*b*), its measure, when imposed under modern Acts of parliament, is invariably limited, so as not to exceed three, or at most four, years; but, in connection with it, the sentence frequently inflicts the additional severity of *hard labour* (*c*), or of *solitary confinement*, or both,

(*u*) F. N. B. 76.

(*x*) 8 Rep. 40. The words of Blackstone are—"a stranger, not "being party to any suit"—(4 Bl. Com. 380); but Lord Coke says, "a "stranger to the court."

(*y*) Gilb. Excheq. c. 5.

(*z*) Mirror, c. 5, s. 3; Lamb. Eirenarch. 575.

(*a*) Norton's case, Dyer, 232.

(*b*) As to prisons and their regulation, vide sup. vol. III. p. 223. Persons under the age of *sixteen*, convicted of any offence before any court, magistrate, or justice of the peace, and whose sentence shall include imprisonment for, at the least, fourteen days, may now, at the expiration of the sentence, be ordered to be detained in a *reformatory school* for a period not less than two or more than five years. As to these schools, vide sup. vol. III. p. 214.

(*c*) The punishment of *hard labour* is said to have been first introduced by 5 Ann. c. 6. (See R. *v.* Baker, 7 A. & E. 502.) Hard labour may now be added in most cases to the

according to the nature of the case. By 7 Will. IV. & 1 Vict. c. 90, s. 5, it is however provided, that from thenceforth it shall not be lawful for the court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year. Imprisonment, even where not the regular punishment, may sometimes be inflicted, in capital cases, by way of commutation for the punishment of death. For by 11 Geo. IV. & 1 Will. IV. c. 39, s. 7, in cases where the Crown shall extend mercy to a capital offender, on condition of imprisonment with or without hard labour, the court, or any judge of the courts at Westminster, to whom the intention shall be signified, shall allow the offender the benefit of a conditional pardon, and make an order for the imprisonment accordingly.

As to *whipping*, the offender, under such modern Acts of parliament as authorize this punishment, is generally directed to be once, twice, or thrice, publicly or privately whipped, if the court think fit, in addition to such imprisonment as inflicted by the Act. By 1 Geo. IV. c. 57, however, judgment shall in no case be given, that any *female* convicted of any offence, shall be whipped either publicly or privately. But in cases where the whipping of female offenders had, before that Act, formed either a part or the whole of the sentence,—the court or justice of the peace is empowered to pass sentence of confinement to hard labour in the common gaol or house of correction, for any time not exceeding six months, or less than one month; or of solitary confinement therein, for any space not exceeding seven days at any one time; in lieu of the sentence of being publicly or privately whipped.

As to *penal servitude*, this is a sentence which has been very recently introduced in substitution for that of *trans-*

sentence of imprisonment. See 7 & 8 Geo. 4, cc. 28, 29; 9 Geo. 4, c. 31; 11 Geo. 4 & 1 Will. 4, c. 39; 2 & 3 Will. 4, c. 34; 7 Will. 4 & 1 Vict. cc. 84, 85, 86, 87, 88, 89, 90, 91; 2 & 3 Vict. c. 56; 14 & 15 Vict. c. 19; c. 100, s. 29, &c. &c.

portation (*d*). The Act by which transportation was chiefly regulated, is that of 5 Geo. IV. c. 84 (*e*): which enacted, that every person convicted of an offence made liable to it by any statute, might be sentenced to be transported beyond the seas for such term as authorized by law in the particular case;—that whenever the Crown should be pleased to extend mercy to any offender convicted of a capital crime, upon condition of transportation beyond the seas, such offender should be allowed the benefit of a conditional pardon, and an order be made by the court for his immediate transportation (*f*);—that places might be appointed within England and Wales, either on land or on board vessels in the Thames or other river, or within some port or harbour, for confinement of offenders under sentence of transportation, to be there kept under the immediate management of a superintendent and overseer (*g*),—and that such offenders, (if males,) might be kept to labour in any part of the dominions of the Crown out of England to be named by order in council (*h*). Great and increasing difficulty, however, having arisen, of late years, in finding colonies willing to receive transported convicts, fresh arrangements were made, by 16 & 17 Vict. c. 99, and 20 & 21 Vict. c. 3 (*i*), for the disposal of persons who, if those Acts had

(*d*) As to transportation, Blackstone remarks (vol. iv. p. 401) that it is "allowable and warranted by the Habeas Corpus Act, 31 Car. 2, c. 2, s. 14." It is said (Barr. on Statutes, 352) to have been first inflicted as a punishment by 39 Eliz. c. 4. As to its history, see R. *v.* Baker, 7 A. & E. 502; Bullock *v.* Dodds, 2 B. & Ald. 262, 267; Whitehead *v.* The Queen, 7 Q. B. 532.

(*e*) See also 6 Geo. 4, c. 69; 11 Geo. 4 & 1 Will. 4, c. 39; 7 Will. 4 & 1 Vict. c. 90; 6 & 7 Vict. c. 7; 16 & 17 Vict. c. 99, s. 7.

(*f*) 5 Geo. 4, c. 84, ss. 2, 3.

(*g*) 5 Geo. 4, c. 84, s. 10. See also 5 & 6 Vict. c. 29; 6 & 7 Vict. c. 26; 9 & 10 Vict. c. 26; 10 & 11 Vict. c. 67; 13 & 14 Vict. c. 39; 16 & 17 Vict. c. 121. As to directors of convict prisons, vide sup. vol. III. p. 230.

(*h*) It may be remarked, that Bermuda and Gibraltar are places in which convicts have been long kept to labour under this provision. See evidence of Mr. Waddington, Second Report of Select Committee on Transportation, p. 2.

(*i*) Even before the date of the first of these statutes, (20 Aug. 1853,) it had become the practice to detain in this country certain classes of

not passed, might have been sentenced to transportation; and of these new provisions, (which also regulate the treatment of those convicts who are sentenced under any statute to be kept in penal servitude,) a short account shall here be given.

By these Acts then, it is enacted that no person shall be for the future sentenced to transportation; and that any person who, if they had not passed, might have been so sentenced, shall now be liable to be sentenced to be kept in penal servitude for a term of the same duration, as that of transportation to which such person would, in such case, have been liable; and that where the court would formerly have had discretion to award one of any two or more terms of transportation, it shall now have the like discretion to award one of any two or more of the terms of penal servitude authorized to be awarded instead of transportation. But there is a proviso that any person who might have been sentenced either to transportation or imprisonment, may be sentenced either to penal servitude for the same term or to the same period of imprisonment; and that where sentence of seven years' transportation might have been passed, it shall be lawful for the court in its discretion to pass a sentence of penal servitude of not less than three years; and that where, in any enactment now in force, the expression "any crime punishable with transportation," or "any crime punishable by law with transportation," or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any offence punishable with penal servitude (*j*).

It is also provided, that whenever mercy shall be extended to any offender convicted of a capital crime, on

convicts sentenced to transportation (Evidence of Mr. Waddington, ubi sup. p. 3); and by 16 & 17 Vict. c. 99, penal servitude for a certain number of years, was substituted for the sentence of transportation, in every case in which the convict was liable under any previous statute to be transported for any term short of fourteen years.

(*j*) 20 & 21 Vict. c. 3, s. 6.

condition of being kept in penal servitude for any term of years or for life, such extension of mercy shall have the same effect, as formerly in the case of the condition being transportation beyond seas; and that every person sentenced or ordered to be kept in penal servitude for any term may, during such term, be confined in any prison or place of confinement in any part of the united kingdom, or in any river, port, or harbour thereof, or in any part of her Majesty's dominions beyond the seas, or in any ports or harbours thereof, (duly appointed for such purpose by order in Council (*i*),) as one of her Majesty's principal secretaries shall from time to time direct; and may be kept to hard labour and otherwise dealt with as persons sentenced to transportation might formerly be dealt with while so confined.

It is further provided, that it shall be lawful for her Majesty, by order in writing, under the hand and seal of a principal secretary of state, to grant to any convict sentenced or ordered to be kept in penal servitude, or to be imprisoned, a *licence to be at large* in the united kingdom and the channel islands, or in such part thereof respectively as shall be expressed in the licence, during such portion of his term, and on such conditions in all respects, as to her Majesty shall seem fit; and that such licence may be revoked or altered at pleasure; and that if revoked the convict may be forthwith apprehended, and recommitted to the prison from which he was released by virtue of his licence, or to any other prison in which convicts under sentence of penal servitude may be lawfully confined (*j*).

(*i*) By 20 & 21 Vict. c. 3, s. 4, the provision of 5 Geo. 4, c. 84, (vide sup. p. 514) as to the appointment of places of confinement for transported convicts in places beyond the seas, is extended and made applicable to the case of convicts under sentence or order of penal servitude.

(*j*) 16 & 17 Vict. c. 99, s. 9; 20 & 21 Vict. c. 3, s. 5. A select committee of the House of Commons having been appointed to inquire into the provisions and operation of 16 & 17 Vict. c. 99, it was resolved and reported to the House, that the system of "licences to be at large," or "tickets of leave," appeared to be founded on a wise and just principle, viz., "that of enabling a convict to "obtain, by continued good conduct

Moreover, persons under sentence or order of penal servitude may be removed from the prisons in which they are severally confined, to any other prison or penitentiary in Great Britain, there to be confined for such time as her Majesty, by order in writing from a principal secretary of state, shall direct, not exceeding the time for which they might have been lawfully confined in the prisons from which they shall have been severally removed (*k*).

When sentence of *death*, the most terrible judgment in the laws of England, is pronounced, the mode in which it is to take place is particularized in the sentence itself, and is always that the prisoner be hanged by the neck till dead (*l*); a mode of capital punishment that has been in use in this country from time immemorial (*m*).

Upon the passing of this sentence [the immediate inseparable consequence from the common law is *attainder* (*n*).

"while undergoing his punishment, the remission of a portion of his "sentence, upon the express con- "dition, however, that in case of "subsequent misconduct his liability "to punishment shall revive for the "residue of the term specified in the "original sentence." This Report was ordered by the House of Commons to be printed, 11 July, 1856. It may be remarked, that on a similar principle, while the sentence of transportation was still in use, the governor of a penal settlement was allowed to recommend to the Crown any transported convict for an absolute or conditional pardon, or to grant him a "ticket of leave," under which he might apply himself to labour, within the limits of the colony, for his own benefit. As to such pardons and tickets of leave, see 6 & 7 Vict. c. 7.

(*k*) 10 & 11 Vict. c. 67; 16 & 17 Vict. c. 99, s. 7.

(*l*) 2 Hale, P.C. 399; Hawk. P.C. b. 2, c. 48, s. 7. This is now the universal mode. In treason, however, as we have seen (vide sup. p. 233), it is accompanied with other severities; and the case was formerly the same with murder (as to which, vide sup. p. 146). Nor did hanging in former times always form part of the sentence. For when a woman was convicted of treason, or petit treason, the sentence was that of being burned to death (vide sup. p. 148); and the judgment for treason in counterfeiting the coin of this kingdom or the Great Seal, as to females, was to be drawn and burnt. As to males, it was to be drawn and hanged. 1 Hale, P. C. 351.

(*m*) Lord Coke says that before the reign of Henry the first, the judgment for felony was not always one, but that that monarch ordained in parliament, that it should be as above for all manner of felonies. 3 Inst. 53.

(*n*) See as to this, sup. vol. I. p. 444.

[chief justice of the Queen's Bench, (the supreme coroner of all England,) in person, upon the view of the body of one killed in open rebellion, records it, and returns the record into his own court, both lands and goods shall be forfeited (*a*).

With us in England forfeiture of lands and tenements to the Crown for treason, is by no means derived from the feudal policy, but was antecedent to the establishment of that system in this island, being transmitted from our Saxon ancestors, and forming a part of the antient Scandinavian constitution.] It is based indeed on natural justice.

[The natural justice of forfeiture or confiscation of property for treason is founded in this consideration,—that he who hath thus violated the fundamental principles of government, and broken his part of the original contract

(*a*) 4 Rep. 57. It was enacted by 7 Ann. c. 21, that after the decease of the then Pretender no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the traitor himself. The history of this matter is somewhat singular, and worthy of observation, says Blackstone, and his account of it (vol. iv. p. 384) is as follows: "At the time "of the Union the crime of treason "in Scotland was, by the Scots law, "in many respects different from "that in England; and particularly "in its consequence of forfeitures "of entailed estates, which was more "peculiarly English: yet it seemed "necessary that a crime so nearly "affecting government should, both "in its essence and in its conse- "quences, be put upon the same "footing in both parts of the united "kingdom. In new modelling these "laws the Scotch nation and the "English house of commons strug- "gled hard, partly to maintain, and "partly to acquire, a total immu- "nity from forfeiture and corrup- "tion of blood, which the house "of lords as firmly resisted. At "length a compromise was agreed "to, which is established by this "statute, viz. that the same crimes, "and no other, should be treason in "Scotland that are so in England; "and that the English forfeitures "and corruption of blood should take "place in Scotland till the death of "the then Pretender, and then cease "throughout the whole of Great "Britain (Burnet's Hist. A.D. 1709); "the lords artfully proposing this "temporary clause in hopes, it is "said, that the prudence of succeed- "ing parliaments would make it "perpetual. This was partly done "by the statute 17 Geo. 2, c. 39, "made in the year preceding the "rebellion of 1745." And by 39 & 40 Geo. 3, c. 93, the above-mentioned provision of the stat. 7 Ann. c. 21, was repealed.

[between king and people, hath abandoned his connections with society, and hath no longer any right to those advantages which before belonged to him purely as a member of the community; among which social advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures, moreover, whereby his posterity may suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections, and will interest every dependent and relation he has, to keep him from offending, according to that beautiful sentiment of Cicero (*b*), "*nec vero me fugit quam sit acerbum, parentum scelera filiorum pœnis lui; sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicæ redderet.*" And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for despising the power of the tyrants, his old age and his want of children; for children are pledges to the prince, of the father's obedience (*c*). Yet many nations have thought that this posthumous punishment savours of hardship to the innocent, especially for crimes that do not strike at the very root and foundations of society, as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius, in every other instance but that of treason, thought it more just, "*ibi esse pœnam, ubi et noxa est;*" and ordered that "*peccata suos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum* (*d*)." And Justinian also, made a law to restrain the punishment of relations (*e*), which directs the forfeiture to go, except in the case of *crimen majestatis*, to the next of kin to the delinquent. On the other hand, the Macedonian laws extended even the capital punishment of treason, not only

(*b*) Ad Brutum, ep. 12.
(*c*) Gravin. 1, s. 68.
(*d*) Cod. 9, 47, 22.
(*e*) Nov. 134, c. 13.

[to the children, but to all the relations of the traitor (*f*); and of course their estates must also be forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle (*g*), copied almost *verbatim* from Justinian's code (*h*), the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's *particular bounty*. But they are deprived of all their effects and rights of succession, and are rendered incapable of any honour, ecclesiastical or civil, "to the end "that, being always poor and necessitous, they may for "ever be accompanied by the infamy of their father; may "languish in continual indigence: and may find," says this merciless edict, "their punishment in living, and their "relief in dying."]

By attainder for felony, [the offender also forfeits all his chattel interests absolutely (*i*), and the profits of all estates of freehold during life;] and by attainder for *murder*, the freehold lands of the offender, which he had in fee simple, are also forfeited to the Crown for a year and a day, with power to the Crown of committing upon them what waste it pleases; subject to which they escheat to the lord of the fee, as will be presently explained. This doctrine of *year*, *day*, and *waste* (*k*) applied, until recently, to attainder for any felony whatever, with the exception of treason, which, as we have seen, is differently provided for; and the history of it is as follows. [Formerly the sovereign had only a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods. And a punishment of a similar spirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus, in the books of Daniel (*l*), and Ezra (*m*); which, besides the pain of death inflicted on

(*f*) Qu. Curt. l. 6.
(*g*) Cap. 24.
(*h*) L. 9, t. 8, l. 5.
(*i*) See Bishop *v.* Curtis, 18 Q. B. 878.
(*k*) 2 Inst. 37.
(*l*) Ch iii. 29.
(*m*) Ch. vi. 11.

[the delinquents there specified, ordain "that their houses shall be made a dunghill." But this tending greatly to the prejudice of the public, it was agreed in the reign of Henry the first, in this kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit (*n*); and, therefore *Magna Charta* (*o*) provides that the king shall only hold such lands for a year and a day, and then restore them to the lord of the fee, without any mention made of waste. But the statute 17 Edw. II., *de prærogativa regis*, seems to suppose that the king shall have his year, day *and* waste, and not the year and day *instead of* waste; which Sir Edward Coke and the author of the Mirror before him, very justly look upon as an encroachment, though a very antient one, of the royal prerogative (*p*).] And such continued to be the state of the law on this subject until the passing of the 54 Geo. III. c. 145, though it was the practice to compound for the year, day and waste, to prevent the Crown from exercising its right of [entry. But now by the statute just mentioned, no attainder for felony which shall thereafter take place, (except in cases of *treason* or *murder*, or of abetting, procuring or counselling the same,) shall extend to the disinheritance of any heir, nor to the prejudice of the right or title of any person other than the right or title of the offender during his life only: and it shall be lawful to every person to whom the right or interest of any lands, tenement or hereditaments after the death of such offender should or might have appertained, if no such attainder had been, to enter into the same.

This forfeiture of felony, it is to be observed, arises only upon attainder (*q*); [and therefore a *felo de se* forfeits no lands of inheritance or freehold, for he never is attainted

(*n*) Mirr. c. 4, s. 16; Flet. l. 1, c. 28.

(*o*) 9 Hen 3, c. 22.

(*p*) Mirr. c. 5, s. 2; 2 Inst. 37.

(*q*) R. *v.* Bridges, 1 Mee & W. 145.

[as a felon (*r*). It likewise relates back to the time of the offence committed, as well as forfeitures for treason, so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender; but the cruelty and reproach must lie on the part, not of the law, but of the criminal, who has thus knowingly and dishonestly involved others in his own calamities.

These are all the forfeitures of real estates created by the common law, as consequential upon attainders, by judgment of death or outlawry. The particular forfeitures created by the statutes of *præmunire* and others are here omitted, because they are to be looked upon rather as a *part* of the judgment and penalty inflicted by the respective statutes, than as *consequences* of such judgment, as in treason and murder they are. But as a part of the forfeiture of real estates, it may be proper just to mention the forfeiture of the profits of lands during life, which extends to two other instances besides those already spoken of,—misprision of treason (*s*); and striking in the superior courts in Westminster Hall (*t*), or drawing a weapon upon a judge there presiding (*u*).

The forfeiture of *goods and chattels* accrues in every treason or misprision thereof, felonies of all sorts (*x*), self-murder or felony *de se*, and the above-mentioned offences in the superior courts of justice. For *flight* also, on an accusation of treason or felony (*y*), whether the party be

(*r*) 3 Inst. 55.

(*s*) 3 Inst. 218; vide sup. p. 234.

(*t*) The words of Blackstone are "striking in Westminster Hall"—(4 Bl. Com. 386.) As to this offence, vide sup. p. 290.

(*u*) 3 Inst. 141.

(*x*) It also accrued in "petit larceny." (As to which, vide sup. p. 188.) But it is provided by 10 & 11 Vict. c. 12, that no conviction of a *juvenile offender* under the authority of that Act, shall be attended with any forfeiture; and by 18 & 19 Vict. c. 126, s 11, every conviction by justices in petty sessions, under that Act, shall have the same effect as a conviction upon indictment for the same offence would have had, except that it shall not be attended with any forfeiture. (As to these Acts, vide sup. pp. 394, 395.)

(*y*) Blackstone adds, "or even petit larceny."

[found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels; for the very flight is an offence carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by the law.] But in modern times it has not been usual for the jury to find the flight (*z*); [forfeiture been looked upon, since the vast increase of personal property of late years, as too large a penalty for an offence to which a man is prompted by the natural love of liberty.] And now by statute 7 & 8 Geo. IV. c. 28, s. 5, it is enacted, that where any person shall be indicted for treason or felony, the jury impanelled to try such person shall not be charged to inquire concerning his lands, tenements or goods, nor whether he fled for such treason or felony.

[There is a remarkable difference or two between the forfeiture of lands, and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before; goods and chattels are forfeited by *conviction* (*a*): because in many of the cases where goods are forfeited there never is any attainder, which happens only where judgment of death or outlawry is given; therefore in those cases the forfeiture must be upon conviction, or not at all; and being necessarily upon conviction in those, it is so ordered in all other cases; for the law loves uniformity. 2. In outlawries for treason or felony (*b*), lands are forfeited only by the judgment; but the goods and chattels are forfeited by a man's being first put into the *exigent*, without staying till he is *quinto exactus*, or finally outlawed; for the secreting himself so long from justice is construed a flight in law (*c*). 3. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances; but the forfeiture of goods and chattels has

(*z*) Staundf. P. C. 183 b; 4 Bl. Com. 387.

(*a*) Vide Roberts *v.* Walker, 1 Russ. & Myl. 756.

(*b*) As to outlawry, vide sup. p. 449.

(*c*) 3 Inst. 232.

[no relation backwards; so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bonâ fide* sell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction (*d*): for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet if they be collusively and not *bonâ fide* parted with, merely to defraud the Crown, the law, and particularly the statute 13 Eliz. c. 5, will reach them; for they are all the while truly and substantially the goods of the offender.]

II. Another immediate consequence of attainder in treason and murder [is the *corruption of blood*, both upwards and downwards: so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the Crown's superior right of forfeiture.] But having had occasion to enlarge on this matter in a former volume, where the subject of escheat was in question (*e*), it is not necessary to detain the reader longer upon it in this place.

(*d*) Hawk. P. C. b. 2, c. 49, s. 33. Accordingly in the case of Whittaker *v.* Wisbey, 12 C. B. 44, a *bonâ fide* assignment after the commission day at the assizes, but before the day of trial, was held good.

(*e*) Vide sup. vol. I. p. 431.

CHAPTER XXIV.

OF REVERSAL OF JUDGMENT.



[We are next to consider how judgments, with their several connected consequences of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A judgment may be falsified, reversed, or avoided, in the first place, *without a writ of error;* for matters foreign to or *dehors* the record, that is, not apparent upon the face of it, so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself.] For example, [where a commission issues to A. and B. and twelve others, or any two of them, of which A. or B. shall be one, to take and try indictments, and any of the other twelve proceed without the interposition or presence of either A. or B.; in this case all proceedings, trials, convictions and judgments against any person are void for want of a proper authority in the commissioners, and may be falsified] in any other cause or court [upon bare inspection, without the trouble of a writ of error (*a*), it being a high misdemeanor in the judges so proceeding, and little, (if anything,) short of murder in them all, in case any person so attainted be executed and suffer death. So likewise if a man purchases land of another, and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of treason or felony previous to the sale or alienation, whereby such land becomes

(*a*) Hawk. P. C. b. 3, c. 50, ss. 2, 3,

[liable to forfeiture or escheat; now, upon any trial, the purchaser is at liberty, without bringing any writ of error, to falsify not only the time of the felony or treason supposed, but the very point of the felony or treason itself; and is not concluded by the confession or the outlawry of the vendor; though the vendor himself is concluded, and not suffered now to deny the fact, which he has by confession or flight acknowledged. But if such attainder of the vendor was by verdict on the oath of his peers, the alience cannot be received to falsify or contradict the *fact* of the crime committed; though he is at liberty to prove a mistake in *time*, or that the offence was committed after the alienation, and not before (*a*).

Secondly, a judgment may be reversed *by writ of error;* which lies from all inferior criminal jurisdictions] to the Court of Queen's Bench (*b*), and from the Queen's Bench to the Court of Exchequer Chamber, and thence to the House of Peers; and may be brought for notorious and substantial mistakes in the judgment or other parts of the record; [as where a man is found guilty of perjury, and receives the judgment of felony.] But for merely *formal* defects, no writ of error can now be brought; it being provided (as we have seen), that all such shall be either immaterial, or, when still ground for objection, shall at least be brought forward by demurrer or motion to quash the indictment (*c*). It is also to be observed, that a writ of error is never allowed, even in case of a mere misdemeanor, as of course; but only [on sufficient probable cause shown to the attorney-general.] Supposing, however, such probable cause to appear, they are [understood to be grantable of common right and *ex debito justitiæ* (*d*).] And by 8 & 9 Vict. c. 68 (amended by 9 & 10

(*a*) 3 Inst. 231; 1 Hale, P. C. 361.

(*b*) If the sentence appears to be erroneous, but the indictment valid, the prisoner must be discharged. (R. *v.* Bourno, 7 A. & E. 58.) As to writs of error sued out for the purpose of compromising a prosecution, see Alleyne's case, 1 Dearsley's C. C. R. 505; 4 Ell. & Bl. 186.

(*c*) Vide sup. p. 466.

(*d*) See Ex parte Newton, 4 Ell. & Bl. 869; 16 C. B. 97.

Vict. c. 24, and 16 & 17 Vict. c. 32 (*e*)), where judgment shall have been given for a misdemeanor, and the defendant shall have obtained a writ of error to reverse it, execution thereon shall be stayed, and the defendant discharged from imprisonment until such writ of error shall be finally determined; subject, however, to a proviso, that no execution shall be stayed, nor discharge take place, until the defendant shall be bound by recognizance, (with two sufficient sureties,) to prosecute the writ of error with effect, and personally to appear in court on the day on which judgment thereon shall be given; and, in case the judgment be affirmed, forthwith to render the defendant to prison according to the judgment. But writs of error to reverse attainders in capital cases are [only allowed *ex gratia*, and not without express warrant under the king's sign manual, or at least by the consent of the attorney-general (*f*). These therefore can rarely be brought by the party himself (*g*), especially where he is attainted for an offence against the state; but they may be brought by his heir or executor after his death, in more favourable times; which may be some consolation to his family.] In this case, however, the more effectual way, is [to reverse the attainder by Act of Parliament: which may be and hath been frequently done upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honours and estate, or some or one of them, by Act of Parliament; which, so far as it extends, has all the effect of reversing the attainder, without casting any reflections upon the justice of the preceding sentence.]

(*e*) As to the condition of the recognizance required by the two first statutes mentioned in the text, see Dugdale *v.* The Queen, 1 Dearsley's C. C. R. 254.

(*f*) 1 Vern. 170, 175.

(*g*) There occurred one recently, in the case of Mansell *v.* The Queen, as to which, vide sup. p. 490.

When the judgment is reversed upon a writ of error in any criminal case, the statute 11 & 12 Vict. c. 78, provides that it shall be competent to the court of error either to pronounce the proper judgment itself, or to remit the record to the court below, in order that that court may pronounce the proper judgment (*h*). And if the judgment be affirmed, or the writ quashed, then, by 16 & 17 Vict. c. 32, s. 4, the court of error may forthwith commit the defendant, if present, to the Queen's Prison: and, by sect. 5 of the same Act, on its being made to appear to any one of the judges that the recognizances have been estreated, the judgment affirmed, or the writ quashed,—and that default has been made for the space of four days in rendering the defendant to prison, such judge may issue his warrant for the apprehension of the defendant.

[The effect of falsifying or reversing an *outlawry* is, that the party shall be in the same plight as if he had appeared upon the *capias*; and if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction he shall receive the sentence of the law; for all the other proceedings, except only the process of outlawry for his non-appearance, remain good and effectual as before. But when judgment pronounced upon *conviction* is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates; with regard to which last, though they be granted away by the Crown, yet the owner may enter upon the grantee with as little ceremony as he might enter upon a disseisor (*i*). But he still remains liable to another prosecution for the same offence; for the first being erroneous, he never was in jeopardy thereby.]

(*h*) As to the construction of this statute, see per Lord Campbell, C. J., Holloway *v.* The Queen, 17 Q. B. 327.

(*i*) Hawk. P. C. b. 2, c. 50, s. 20.

CHAPTER XXV.

OF REPRIEVE AND PARDON.



[The only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

1. A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time: whereby the execution is suspended.]

This may be in the first place, [*ex mandato regis*, that is, the mere pleasure of the Crown, expressed to the court by which execution is to be awarded (*a*).]

Again, there may be a reprieve [*ex arbitrio judicis*; either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or sometimes if any favourable circumstances appear in the criminal's character,—in order to give room to apply to the Crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired: but this rather by common usage, than of strict right (*b*).

Reprieves may also be *ex necessitate legis*; as, where a woman is capitally convicted, and pleads her pregnancy: though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy

(*a*) 1 Hale, P. C. 368; 2 Hale, P. C. 412; Hawk. P. C. b. 2, c. 51, s. 8.

(*b*) 2 Hale, P. C. 412.

[dictated by the law of nature, *in favorem prolis;* and therefore no part of the bloody proceedings, in the reign of queen Mary, hath been more justly detested than the cruelty that was exercised in the island of Guernsey, of burning a woman big with child: and when, through the violence of the flames, the infant sprang forth, at the stake, and was preserved by the by-standers, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic (*c*). A barbarity which they never learned from the laws of *antient* Rome; which direct (*d*), with the same humanity as our own, "*quod prægnantis mulieris damnatæ pœna differatur, quoad pariat:*" which doctrine has also prevailed in England, as early as the first memorials of our law will reach (*e*). In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact: and if they bring in their verdict *quick with child,* (for, barely *with child,* unless it be alive in the womb, is not sufficient,) execution shall be stayed generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a further respite for that cause (*f*). For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.

Another cause of regular reprieve is, if the offender become *non compos,* between the judgment and the award of execution (*g*):] for by the common law, (on which, as formerly shown, some new provisions have now been engrafted by Act of Parliament (*h*), [though a man be *compos* when he commits a capital crime, yet if he becomes *non*

(*c*) Fox, Acts and Mon.

(*d*) Ff. 48, 19, 3.

(*e*) Flet. l. 1, c. 38.

(*f*) 1 Hale, P. C. 369.

(*g*) Ibid. 370.

(*h*) Vide supra, p. 99.

[*compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for "*furiosus solo furore punitur*," and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is, therefore, an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege, why execution should not be awarded against him: and if he appears to be insane, the judge in his discretion may and ought to reprieve him. Or, the party may, *plead* in bar of execution; which plea may be either pregnancy, the royal pardon, an act of grace, or diversity of person, viz. that he is not the same that was attainted, and the like. In the last case a jury shall be impanelled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be *instanter* (*i*), and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted (*k*); neither shall any peremptory challenges of the jury be allowed the prisoner (*l*); though formerly such challenges were held to be allowable, wherever a man's life was in question (*m*).

II. If neither pregnancy, insanity, non-identity, nor other plea, will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the sovereign's most gracious *pardon*; the granting of which is the most amiable prerogative of the Crown. Law, says an able writer, cannot be framed on principles of compassion to guilt: yet justice, by the constitution of

(*i*) R. *v.* Corbet, 1 Sid. 72.

(*k*) Fost. 42.

(*l*) R. *v.* Okey, 1 Lev. 61; Fost. 42, 46.

(*m*) Staundf. P. C. 163; Co. Litt. 157; Hal. Sum. 259.

[England, is bound to be administered in mercy: this is promised by the sovereign in his coronation oath, and it is that act of his government, which is the most personal, and most entirely his own (n). The king himself condemns no man: that rugged task he leaves to his courts of justice: the great operation of his sceptre is mercy. His power of pardoning was said, by our Saxon ancestors (o), to be derived *a lege suæ dignitatis;* and it is declared in parliament, by statute 27 Henry VIII. c. 24, that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm (p).

This is indeed one of the great advantages of monarchy, in general, above any other form of government, that there is a magistrate who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment. Pardons, (according to some theorists (q),) should be excluded in a perfect legislation, where punishments are mild but certain: for the clemency of the prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter (r); or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender, though they alter not the essence of the crime, ought to make no distinction in the punishment. In democracies, however, this power of pardon can never subsist; for there, nothing higher is acknowledged than the magistrate who adminis-

(n) Law of Forfeit. 99.

(o) Wilk. Leg. Ang. Sax. LL. Edw. Conf. c. 18.

(p) It is observable that this power belongs only to a king *de facto,* and not to a king *de jure* during the time of usurpation. Bro. Abr. t. Charter de Pardon, 22.

(q) Beccar. c. 20.

(r) Ibid. c. 4.

[ters the laws; and it would be impolitic for the power of judging and of pardoning to centre in one and the same person. This, as the president Montesquieu observes (*s*), would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell whether a prisoner were discharged by his innocence, or obtained a pardon through favour (*t*). But in monarchies, the king acts in a superior sphere; and though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, magnificence, or compassion. To him, therefore, the people look up as the fountain of nothing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects; and contribute more than anything to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince.

Under this head of pardons let us briefly consider—First, the *subject* of pardon. Secondly, the *manner* of pardoning. Thirdly, the method of *allowing* a pardon. Fourthly, the *effect* of such pardon when allowed.

And, first, the sovereign may pardon all offences merely against the Crown or the public, excepting—1. That to preserve the liberty of the subject, the committing any man to prison out of the realm, is by the Habeas Corpus Act, 31 Car. II. c. 2, made a *præmunire*, unpardonable even by the king. Nor—2. Can the king pardon, where private justice is principally concerned in the prosecution of offenders; "*non potest rex gratiam facere cum injuriâ et damno aliorum*" (*u*)]—though by 7 & 8 Geo. IV. c. 29, (for con-

(*s*) Sp. L. b. 6, c. 5.

(*t*) "In Holland, therefore," says Blackstone, "if there be no stadt-"holder, there is no power of par-"doning lodged in any other mem-"ber of the state."—4 Bl. Com. 398.

(*u*) 3 Inst. 236.

solidating the laws relative to larceny and other offences connected therewith,) and by cap. 30 of the same session, (the Malicious Injuries Act,)—he may extend his mercy to any person imprisoned by virtue of either of those Acts, even when imprisoned for nonpayment of money to some party other than the Crown, as where a sum of money has been ordered by a magistrate to be paid to an aggrieved party (*v*). Upon this principle [he cannot pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it; though afterwards he may remit the fine: because though the prosecution is vested in the king to avoid multiplicity of suits, yet, during its continuance, this offence savours more of the nature of a *private* injury to each individual in the neighbourhood, than of a *public* wrong (*x*). Neither can the king pardon an offence against a popular or penal statute after information brought: for thereby the informer hath acquired a private property in his part of the penalty (*y*).

There is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments, viz. that the king's pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of Charles the second, the Earl of Danby was impeached by the house of commons of high treason and other misdemeanors, and pleaded the king's pardon in bar of the same, the commons alleged (*z*), "that there was no precedent that ever any "pardon was granted to any person impeached by the "commons of high treason, or other high crimes *depend-* "*ing the impeachment*;" and thereupon resolved (*a*), "that "the pardon so pleaded was illegal and void, and ought "not to be allowed *in bar* of the impeachment of the com- "mons of England;" for which resolution they assigned (*b*)

(*v*) 7 & 8 Geo. 4, c. 29, s. 69; c. 30, s. 35.

(*x*) Hawk. P. C. b. 2, c. 37, s. 33.

(*y*) 3 Inst. 238.

(*z*) Com. Journ. 28 April, 1679.

(*a*) Ibid. 5 May, 1679.

(*b*) Ibid. 26 May, 1679.

[this reason to the house of lords; "that the setting up a "pardon to be a *bar* of an impeachment defeats the whole "use and effect of impeachments; for should this point be "admitted or stand doubted, it would totally discourage "the exhibiting any for the future, whereby the chief in-"stitution for the preservation of the government would be "destroyed." Soon after the revolution, the commons renewed the same claim, and voted (*c*) "that a pardon is not "*pleadable in bar* of an impeachment." And at length it was enacted by the Act of Settlement, 12 & 13 Will. III. c. 2, "that no pardon under the Great Seal of England "shall be *pleadable* to an impeachment by the commons in "parliament." But after the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged; for after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the Crown, and at length received the benefit of the king's most gracious pardon (*d*).

(*c*) Com. Journ. 6 June, 1689.

(*d*) The following remarkable record, in which it is both acknowledged by the commons and asserted by the sovereign, proves that the king's prerogative to pardon delinquents convicted in impeachments is as antient as the constitution itself.

"*Item prie la commune a nostre dit seigneur le roi, que nul pardon soit grante a nully persone, petit ne grande, q'ont este de son counseil et serementez, et sont empeschez en cest present parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, tenemenz, biens, ou chateux, lesqueux sont ou serront trovez en aucun defaut encontre leur ligeance, et la tenure de leur dit serement; mais q'ils ne serront jammes conseillers ne officers du roi, mais en tout oustez de la courte le roi et de conseil as touz jours. Et sur ceo soit en present parlement fait estatut s'il plest au roi, et de touz autres en temps a venir en cas semblables, pur profit du roi et de roialme.*

"*Responsio: Le roi ent fra sa volente, come mieltz lui semblera.*"—Rot. Parl. 50 Edw. 3, n. 188.

After the lords have delivered their sentence of guilty, the commons have the power of pardoning the impeached convict, by refusing to demand judgment against him; for no judgment can be pronounced by the lords till it is demanded by the commons. Lord Macclesfield was found guilty without a dissenting voice in the house of lords; but when the question was afterwards proposed in the house of commons, *that this house will demand judgment of the lords against Thomas earl of Macclesfield*, it occasioned a warm debate, but (the previous question being first moved) it was carried

[Secondly, as to the *manner* of pardoning. 1. First, it must be under the Great Seal,] or warrant under the Sign-manual. A warrant, indeed, under the privy seal or sign-manual was formerly held not competent to confer a complete irrevocable pardon (*e*). But now by 7 & 8 Geo. IV. c. 28, s. 13 (*f*), where the king's majesty shall be pleased to extend his royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under his royal sign-manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or conditional pardon; the discharge of such offender out of custody, in the case of a free pardon, and the performance of the condition, in the case of a conditional pardon, shall have the effect of a pardon under the Great Seal for such offender, as to the felony for which such pardon shall be granted; subject, however, to a proviso, that they shall have no effect to prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after such pardon. There may also be a constructive pardon without any seal or sign-manual, and by the mere endurance of the appropriate punishment. For, by 9 Geo. IV. c. 32, s. 3, (reciting that it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged,) it is enacted, that where any offender shall be convicted of any felony not punishable with death, and shall endure the punish-

in the affirmative by a majority of 136 voices against 65. (Comm. Journ., 27 May, 1725; 6 H. St. Tr. 762.) In the impeachment of Warren Hastings it was decided, after much serious and learned investigation and discussion, by a very great majority in each house of parliament, that an impeachment was not abated by a dissolution of the parliament; though almost all the legal characters of each house voted in the minorities. Christian's Blackstone, *in notis*.

(*e*) 4 Bl. Com. 400. Blackstone cites 5 St. Tr. 166, 173.

(*f*) And see 6 Geo. 4, c. 25, s. 1; and as to convicts under sentence or order of penal servitude, see 5 Geo. 4, c. 84, s. 2; 6 & 7 Vict. c. 7; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

ment to which he hath been adjudged for the same, the punishment so endured shall have the like effects and consequences as a pardon under the Great Seal, as to the felony whereof the offender was so convicted: subject, however, to a proviso, that it shall not prevent or mitigate any punishment to which he might otherwise be lawfully sentenced on a subsequent conviction for any other felony. 2. [Next, it is a general rule, that whenever it may reasonably be presumed the king is deceived, the pardon is void (*g*). Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed (*h*). 3. General words have also a very imperfect effect in pardons. A pardon of all felonies, will not pardon a conviction or attainder of felony, (for it is presumed the king knew not of those proceedings;) but the conviction or attainder must be particularly mentioned (*i*); and it has been held, that a pardon of felonies will not include piracy (*k*); for that is no felony punishable at the common law], having been cognizable only in the Court of Admiralty, until brought within the jurisdiction of the ordinary courts by Act of Parliament. [4. It is also enacted by statute 13 Rich. II. st. 2, c. 1, that no pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein; and, particularly in murder, it shall be expressed whether it was committed by lying in wait, assault or malice prepense. Upon which Sir Edward Coke observes (*l*), that it was not the intention of the parliament, that the king should ever pardon murder

(*g*) Hawk. P. C. b. 2, c. 37, s. 8.

(*h*) 3 Inst. 238; Hawk. P. C. b. 2, c. 37, s. 46.

(*i*) Hawk. ubi sup. s. 8. Hawkins says that it is taken for granted in many books, that felonies in general (exclusive of treason, murder, and rape), may be pardoned under the general words "all felonies;" but he holds this doctrine to be doubtful, and says that general pardons are commonly made by Act of Parliament, and have been rarely granted by the Crown. Hawk. P. C. b. 2, c. 37, s. 9.

(*k*) Hawk. P. C. b. 1, c. 37, s. 6; b. 2, c. 37, s. 11; Co. Litt. 391 a; 3 Inst. 112.

(*l*) 3 Inst. 236.

[under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations.] Yet pardons for such murders have been frequently granted since that period, and even under the general description of a felonious killing; there being always inserted therein, until the time of the revolution, a *non obstante* of the statute of king Richard (*m*). But it being declared by the Bill of Rights, 1 W. & M. sess. 2, c. 2, that no dispensation by *non obstante* of any statute shall be thenceforth allowed, such general description would now seem to be insufficient (*n*). [Under these and a few other restrictions, it is a general rule, that a pardon shall be taken most beneficially *for* the subject and most strongly *against* the king (*o*).

A pardon may also be *conditional;* that is, the king may extend his mercy upon what terms he pleases, and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend, and this by the common law (*p*); which prerogative is daily exerted in the pardon of felons, on condition of being confined to imprisonment with hard labour for a stated time, or of penal servitude for life, or for a term of years (*q*).

Thirdly, with regard to the manner of *allowing* pardons, we may observe, that a pardon by Act of Parliament is more beneficial than by the king's charter; for a man is not bound to plead it, but the court must *ex officio* take notice

(*m*) Hawk. P. C. b. 2, c. 37, s. 17. It was once made a question, whether murder can be the subject of a pardon under any form of words; and to this point the statutes 6 Edw. 1, st. 1, c. 9; 2 Edw. 3, c. 2, and 14 Edw. 3, st. 1, c. 15, have been cited. But it is now settled that the pardon of murder is as much within the prerogative of the Crown as of any other offence. R. v. Parsons, 1 Show. 283; 2 Salk. 499; 4 Mod. 61; 3 Inst. 236; Hawk. P. C. b. 2, c. 37, s. 14.

(*n*) Hawk. P. C. b. 2, c. 37, s. 17.

(*o*) 4 Rep. 49 b.

(*p*) Hawk. P. C. b. 2, c. 37, s. 45.

(*q*) Vide sup. p. 516.

[of it (*r*); neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon (*s*). The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading not guilty, he has waived the benefit of such pardon (*t*). But if a man avails himself thereof, as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or in bar of execution. Antiently, by stat. 10 Edw. III. c. 2, no pardon of felony could be allowed unless the party found sureties for his good behaviour, before the sheriff and coroners of the county (*u*). But that statute is repealed by the statute 5 & 6 W. & M. c. 13, which, instead thereof, gives the judges of the court a discretionary power to bind the criminal, pleading such pardon, to his good behaviour, with two sureties, for any term not exceeding seven years.

Fourthly, the *effect* of such pardon by the king is to make the offender a new man: to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him new credit and capacity (*x*).] And it seems to be settled that the pardon of treason or felony, even after conviction or attainder, will enable a man to have an action of slander against any one who shall call him either traitor or felon (*y*). A pardon also, if prior to conviction, will prevent any forfeiture either of lands or goods; though, on the other hand, it will not, without express words of restitution, divest either the Crown or a subject of any interest already vested in either, by force of an attainder or conviction precedent (*z*). And [nothing

(*r*) Fost. 43.

(*s*) Hawk. P. C. b. 2, c. 37, s. 59.

(*t*) Ibid. s. 67.

(*u*) R. *v.* Parsons, 1 Show. 283.

(*x*) Hawk. P. C. b. 2, c. 37, s. 48.

(*y*) Ibid.

(*z*) Ibid. s. 54; Bac. Abr. tit. Pardon, H.; see Gough *v.* Davies, 25 L. J. Ch. 677.

[can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and transcendent power of parliament. Yet if a person attainted receives the king's pardon, and afterwards hath a son, that son may be heir to his father, because the father being made a new man, might transmit new inheritable blood;] though supposing him to be born before the pardon, he could never inherit it at all, but the land would escheat, if there were no child born since the pardon, *pro defectû hæredis* (*a*).

(*a*) 1 Hale, P. C. 358.

CHAPTER XXVI.

OF EXECUTION.



[There now remains nothing to speak of but *execution*—the completion of human punishment. And this in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy; whose warrant for so doing was antiently by precept under the hand and seal of the judge, as it is still practised in the court of the lord high steward upon the execution of a peer (*a*): though, in the court of the peers in parliament, it is done by writ from the king. Afterwards it was established (*b*), that in case of life, the judge may command execution to be done without any writ. And now the usage is, for the judge,] in the case of all trials at the assizes, [to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff] as his warrant or authority; and if the sheriff receives afterwards no special order to the contrary, he executes the judgment of the law accordingly (*c*).

(*a*) 2 Hale, P. C. 409.

(*b*) Finch, L. 478.

(*c*) See R. *v.* Bethel, 5 Mod. 22; Christian's Blackstone, vol. iv. p. 404, *in notis*, where it is said that "at the "end of the assizes the clerk of the "assize makes out in writing four "lists of all the prisoners, with "separate columns, containing their "crimes, verdicts and sentences, "leaving a blank column, which the "judge fills up opposite the names "of the capital convicts by writing, "*to be reprieved, respited, transported*, "&c. These four calendars, being "first carefully compared together "by the judge and the clerk of as-"size, are signed by them, and one "is given to the sheriff, one to the "gaoler, and the judge and the clerk "of assize each keep another. If "the sheriff receives afterwards no "special order from the judge, he "executes the judgment of the law "in the usual manner, agreeably to "the directions of his calendar. In

[The sheriff, upon receipt of his warrant, is to do execution within a convenient time; which is left at large (*d*). But in the Court of Queen's Bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution; either specifying the time and place (*e*), or leaving it to the discretion of the sheriff (*f*).] And though in general the law has established no rule as to the time of execution, [it has been well observed (*g*), that it is of great importance that the punishment should follow the crime as early as possible; and that the prospect of gratification or advantage which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.

The sheriff cannot alter the manner of the execution, by substituting one death for another, without being guilty of felony himself, as has been formerly said (*h*). It is held

"every county this important subject is settled with great deliberation by the judge and the clerk of assize before the judge leaves the assize town; but probably in different counties, with some slight variation, as in Lancashire no calendar is left with the gaoler, but one is sent to the secretary of state."

(*d*) The time and place of the execution are by law no part of the judgment (4 Bl. Com. 404, where this is said to have been held by the twelve judges, Mich. 10 Geo. 3). Formerly, indeed, the law required that a person convicted of *murder* should be executed on the day next but one after the sentence, unless it fell on a Sunday, and in that case on the Monday following. 25 Geo. 2, c. 37; 9 Geo. 4, c. 31, s. 4. But this is now repealed by 6 & 7 Will. 4, c. 30. Vide sup. p. 146.

(*e*) St. Trials, vi. 332; Fost. 43. See Atkinson *v.* Reg. (in error), 3 Bro. P. C. 517.

(*f*) In London the course as to execution on convicts formerly was, that the recorder reported to the king, in person, their several cases; and if he received the royal pleasure that the law must take its course, issued his warrant to the sheriffs, directing them to do execution at a specified time and place (4 Bl. Com. 404). But now by 7 Will. 4 & 1 Vict. c. 77, the practice of the Central Criminal Court, as to the award of execution in capital cases, is assimilated to that of other courts.

(*g*) Beccar. c. 19.

(*h*) Vide sup. p. 121.

[also by Sir Edward Coke (*i*) and Sir Matthew Hale (*k*), that even the king cannot change the punishment of the law, by altering the hanging or burning into beheading; though, when beheading is part of the sentence, the king may remit the rest. And, notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains, that, "*judicandum est legibus, non exemplis.*" But others have thought (*l*),—and more justly,—that this prerogative, being founded in mercy, and immemorially exercised by the Crown, is part of the common law. For hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons (viz. by remitting a severe kind of death, on condition that the criminal submits to a milder), is a matter that may bear consideration. It is observable, that when Lord Stafford was executed for the popish plot in the reign of King Charles the second, the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of lords for a command or order from their lordships how the said judgment should be executed; for, he being prosecuted by impeachment, they entertained a notion, (which is said to have been countenanced by Lord Russel,) that the king could not pardon any part of the sentence (*m*). The lords resolved (*n*), that the scruples of the sheriffs were unnecessary, and declared that the king's writ ought to be obeyed. Disappointed of raising a flame in that assembly, they immediately signified (*o*) to the house of commons, by one of the members, that they were not satisfied as to the power of the said writ. That house took two days to consider of it; and then (*p*) sullenly resolved, that the house was *content* that the sheriff do execute Lord Stafford, by severing his head from his

(*i*) 3 Inst. 52.

(*k*) 2 Hale, P.C. 412.

(*l*) Fost. 270; F. N. B. 144, h; 19 Rym. Fœd. 284.

(*m*) 2 Hume, 328.

(*n*) Lords' Journ. 21 Dec. 1680.

(*o*) Com. Journ. 21 Dec. 1680.

(*p*) Ibid. 23 Dec. 1680.

[body. It is further related, that when afterwards the same Lord Russel was condemned for high treason upon indictment, the king, while he remitted the ignominious part of the sentence, observed, "that his lordship would "now find he was possessed of that prerogative which, in "the case of Lord Stafford, he had denied him (q)." One can hardly determine (at this distance from those turbulent times) which most to disapprove of; the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

To conclude: it is clear that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again (r). For the former hanging was no execution of the sentence; and if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force (s), such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm; but his fleeing to sanctuary was held an escape in the officer (t).

And, having thus arrived at the *last* stage of criminal proceedings, or execution,] which terminates our inquiry into the law of crimes, the subject of our sixth Book, we have also reached the conclusion, properly speaking, of these Commentaries; yet it may be useful to endeavour to recal to the memory of the student some principal outlines of the legal constitution of this country, by a short historical review of the most considerable revolutions that have happened in the laws of England from the earliest to the present times: and this will be the task of the next or concluding chapter.

(q) 2 Hume, 360.

(r) 2 Hale, P.C. 412; Hawk. P.C. b. 2, c. 51, s. 7.

(s) Vide sup. p. 464, n. (c).

(t) Fitzh. Abr. tit. "Corone," 335; Finch, L. 467. As to an escape, vide sup. p. 294.

CHAPTER XXVII.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS OF THE LAWS OF ENGLAND.



[Before we enter on the subject of this chapter, in which it is proposed, by way of supplement to the whole, to attempt an historical review of the most remarkable changes and alterations, that have happened in the laws of England, it must be observed, that the rise and progress of many principal points and doctrines have been already pointed out in the course of these Commentaries, under their respective divisions; these having, therefore, been particularly discussed already, it cannot be expected that they should be re-examined with any degree of minuteness, which would be a most tedious undertaking. What, therefore, is at present proposed, is only to mark out some outlines of our English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

The several periods under which we shall consider the state of our legal polity are the following] seven: [1. From the earliest times to the Norman conquest: 2. From the Norman conquest to the reign of king Edward the first: 3. From thence to the reformation: 4. From the reformation to the restoration of king Charles the second: 5. From thence to the revolution in 1688:] 6. From the revolution to the publication of Blackstone's Commentaries on the Laws of England: 7. From the era last mentioned to the present time.

I. [And, first, with regard to the antient Britons, the *aborigines* of our island, we have so little handed down to us concerning them with any tolerable certainty, that our inquiries here must needs be very fruitless and defective. However, from Cæsar's account of the tenets and discipline of the antient Druids in Gaul, in whom centered all the learning of these western parts, and who were, as he tells us, sent over to Britain, (that is, to the island of Mona or Anglesey,) to be instructed,—we may collect a few points, which bear a great affinity and resemblance to some of the modern doctrines of our English law. Particularly the very notion itself of an oral unwritten law, delivered down from age to age, by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters; since it is remarkable that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands, by the custom of gavelkind, which still obtains in many parts of England, and did universally over Wales till the reign of Henry the eighth, is undoubtedly of British original. So likewise is the antient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the present volume, where the same custom continued law, from Cæsar's time, to] down to the reign of George the fourth (*a*), viz. [that of burning a woman guilty of the crime of petit treason by killing her husband.

The great variety of nations, that successively broke in upon and destroyed both the British inhabitants and constitution, the Romans, the Picts, and, after them, the various clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and

(*a*) Vide sup. p. 148.

[antiquities of the kingdom; as they were very soon incorporated and blended together, and therefore, we may suppose, mutually communicated to each other their respective usages (*a*), in regard to the rights of property, and the punishment of crimes. So that it is morally impossible to trace out with any degree of accuracy, *when* the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them (*b*), to their first and component principles. We can seldom pronounce, that *this* custom was derived from the Britons; *that* was left behind by the Romans; *this* was a necessary precaution against the Picts; *that* was introduced by the Saxons; discontinued by the Danes, but afterwards restored by the Normans.

Wherever this can be done, it is a matter of great curiosity, and some use: but this can very rarely be the case; not only from the reason above mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice (*c*); so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and its government: which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of its laws; unless we had as authentic monuments thereof, as the Jews had by the hand of Moses (*d*). Thirdly, this uncertainty of the true origin of particular customs must also in part have arisen from

(*a*) Hale, Hist. C. L. 62.

(*b*) "It is an impossible piece of "chemistry," says Hale, "to reduce "every *caput legis* to its true original, &c."—Hist. C. L. 64.

(*c*) Hale, Hist. C. L. 57.

(*d*) Ibid. 59.

[the means, whereby Christianity was propagated among our Saxon ancestors in this island,—by learned foreigners brought over from Rome and other countries, who undoubtedly carried with them many of their own national customs; and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause, that we find not only some rules of the Mosaical, but also of the imperial and pontifical laws, blended and adopted into our own system.

A further reason may also be given for the great variety, and of course the uncertain original, of our antient established customs; even after the Saxon government was firmly established in this island: viz. the subdivision of the kingdom into many independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite diversity of laws: even though all those colonies, of Jutes, Angles, Anglo-Saxons, and the like, originally sprung from the same mother-country, the great northern hive; which poured forth its warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments: and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen where so many unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

When therefore the West Saxons had swallowed up all the rest, and King Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him,] we are told (*e*), [to undertake a most great and necessary work, which he is said

(*e*) As to the claim of Alfred to the institutions mentioned in the text, see Turner's Hist. of the Anglo-Saxons, vol. ii. p. 149, 6th ed.; Hallam's Middle Ages, vol. ii. pp. 390, 402, 7th ed.

[to have executed in as masterly a manner; no less than to new model the constitution; to rebuild it on a plan that should endure for ages, and out of its old discordant materials, which were heaped upon each other in a vast and rude irregularity, to form one uniform and well-connected whole. This he effected by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours; for to him we owe that masterpiece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties, all under the influence and administration of one supreme magistrate the king; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating ducts and channels, which wise institution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected,] it is said, [the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his dom-bec, or *liber judicialis*. This he compiled for the use of the court-baron, hundred and county court, the court-leet and sheriff's tourn; tribunals which he established for the trial of all causes civil and criminal, in the very districts wherein the complaint arose, all of them subject however to be inspected, controlled and kept within the bounds of the universal or common law by the king's own courts, which were then itinerant, being kept in the king's palace, and removing with his household in those royal progresses, which he continually made from one end of the kingdom to the other.

The Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric, but a plan so excellently concerted could never be long thrown aside. So that upon the expulsion of these intruders, the English returned to their antient law, re-

[taining however some few of the customs of their late visitants, which went under the name of *Dane Lage*, as the code compiled by Alfred was called the *West-Saxon Lage*; and the local constitutions of the antient kingdom of Mercia, which obtained in the counties nearest to Wales and probably abounded with many British customs, were called the *Mercen Lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm; the provincial polity of counties and their subdivisions having never been altered or discontinued through all the shocks and mutations of government, from the time of its first institution, though the laws and customs therein used have, as we shall see, often suffered considerable changes.

For King Edgar, (who besides his military merit as founder of the English navy, was also a most excellent civil governor,) observing the ill effects of three distinct bodies of laws, prevailing at once in separate parts of his dominions, projected and begun what his grandson King Edward the Confessor afterwards completed; viz. one uniform digest or body of laws to be observed throughout the whole kingdom, being probably no more than a revival of King Alfred's code, with some improvements suggested by necessity and experience, particularly the incorporating some of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon Lage*, which was still the groundwork of the whole. And this appears to be the best supported and most plausible conjecture, (for certainty is not to be expected,) of the rise and original of that admirable system of maxims and unwritten customs, which is now known by the name of the common law, as extending its authority universally over all the realm, and which is doubtless of Saxon parentage.

Among the most remarkable of the Saxon laws we may reckon, 1. The constitution of parliaments, or rather general assemblies of the principal and wisest men in the nation;

[the *wittenagemote* or *commune consilium* of the antient Germans, which was not yet reduced to the forms and distinctions of our modern parliament, without whose concurrence, however, no new law could be made or old one altered. 2. The election of their magistrates by the people; originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown; but that of all subordinate magistrates, their military officers or heretochs, their sheriffs, their conservators of the peace, their coroners, their portreeves (since changed into mayors and bailiffs), and even their tithingmen and borsholders at the leet, continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued; only that perhaps in case of minority, the next of kin of full age would ascend the throne as king, and not as protector; though after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence, even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage: to which, in subsequent times, the benefit of clergy in some measure succeeded. 5. The prevalence of certain customs, as heriots and military services in proportion to every man's land, which much resembled the feudal constitution, but yet were exempt from all its rigorous hardships, and which may be well enough accounted for by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feudal law, before it got into the hands of the Norman jurists; who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a law of liberty. 6. The liability of their estates to forfeiture for treason, while the doctrine of escheats and corruption of blood for felony, or

[any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture; a custom which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest, though really inconvenient, and more especially destructive to antient families, which are in monarchies necessary to be supported, in order to form and keep up a nobility, or intermediate state between the prince and the common people. 8. The courts of justice consisting principally of the county courts, and in cases of weight or nicety the king's court held before himself in person, at the time of his parliaments, which were usually holden in different places, according as he kept the three great festivals of Christmas, Easter, and Whitsuntide. An institution which was adopted by King Alonso the seventh of Castile, about a century after the Conquest, who, at the same three great feasts, was wont to assemble his nobility and prelates in his court; who there heard and decided all controversies, and then, having received his instructions, departed home (*f*). These county courts, however, differed from the courts so called in modern times, in that the ecclesiastical and civil jurisdiction were blended together, the bishop and the ealdorman or sheriff sitting in the same county court, and also that the decisions and proceedings therein were much more simple and unembarrassed, an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. The modes of trial which, among a people who had a very strong tincture of superstition, were permitted to be by *ordeal*, by the *corsned*, or morsel of execration, or by *wager of law* with compurgators.] And to these we are to add the occasional resort to modes of determining controversies resembling, in some respects, the celebrated institution which we now enjoy under the name of trial by jury, and to which we are accustomed to

(*f*) Mod. Un. Hist. xx. 114.

refer as the principal bulwark of our national liberties (*g*). [Thus stood the general frame of our polity at the time of the Norman invasion, when the second period of our legal history commences.

II. This remarkable event wrought as great an alteration in our laws, as it did in our antient line of kings; and though the alteration of the former was effected rather by the consent of the people, than any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. Among the first of these alterations we may reckon the separation of the ecclesiastical courts from the civil; effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people, and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests; and this was the more easily effected, because the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

2. Another violent alteration of the English constitution consisted in the depopulation of whole counties for the purposes of the king's royal diversion, and subjecting both them, and all the antient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man.] And though these laws were mitigated in the time of Henry the

(*g*) Turner's Hist. Ang. Sax. vol. iii. p. 223, 6th edit.; Hallam's Mid. Ag. vol. ii. p. 396, 7th ed.

third and in succeeding reigns, yet [from this root afterwards sprung a bastard slip, known by the name of the game law,] by which none were permitted, in general, to take or sell game, even on his own estate, unless qualified by the ownership of land to the yearly value of at least 100*l.*; an arbitrary restraint under which the subjects of this realm continued to labour until its tardy abolition in the reign of William the fourth.

3. [A third alteration in the English laws was by narrowing the remedial influence of the county courts, the great seats of Saxon justice, and extending the *original* jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis*, with all its multifarious authority, was erected, and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people, and formidable to the Crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy; and the consequence naturally was, the ordaining that all proceedings in the king's courts should be carried on in the Norman instead of the English language; a provision the more necessary, because none of his Norman justiciars understood English; but as evident a badge of slavery as ever was imposed upon a conquered people. This lasted till King Edward the third obtained a double victory, over the armies of France in their own country, and the language in our courts here at home; but there was one mischief too deeply rooted thereby, and which this caution of King Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtleties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. Indeed that age, and those immediately succeeding it, were the area of refinement and subtlety. There is an active principle in the human soul, that will ever be exerting its faculties to the

[utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and country, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those who had leisure to cultivate its progress were such only as were cloistered in monasteries, the rest being all soldiers or peasants; and, unfortunately, the first rudiments of science which they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the east by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a rising state, were those of the noblest kind, the establishment of religion, and the regulations of civil polity, yet having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtleties, with a skill most amazingly artificial; but which serves no other purpose than to show the vast powers of the human intellect, however vainly or preposterously employed. Hence law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy, especially when blended with the new refinements engrafted upon feudal property; which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede (as they did in great measure) the more homely but more intelligible maxims of distributive justice among the Saxons. And, to say the truth, these scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the body of our legal polity, that they cannot now be taken out without a manifest injury to the substance,] unless the greatest care be used in the operation. [Statute after statute has in later

[times been made to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigour; and the endeavour has greatly succeeded; but still the scars are deep and visible; and the liberality of our modern courts of justice has been] much called into action, in aid of the express enactments, [in order to recover that equitable and substantial justice which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.

4. A fourth innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations, but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century; and from them it passed to other nations, particularly the Franks and the Normans; which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. But the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feudal tenure, which drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisins, wardships, marriages, escheats and fines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from and holden mediately or immediately of the Crown.

The nation at this period seems to have groaned under as absolute a slavery, as was in the power of a warlike, an ambitious and a politic prince to create. The consciences of men were enslaved by sour ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived; who now imported from Rome for the first time the whole *farrago* of superstitious novelties,

[which had been engendered by the blindness and corruption of the times, between the first mission of Augustin the monk and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images; not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws, too, as well as the prayers, were administered in an unknown tongue. The antient trial by jury gave way to the impious decision by battel. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy *curfew*. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites, who, by a gradual progression of slavery, were absolute vassals to the Crown, and as absolute tyrants to the commons. Unheard-of forfeitures, talliages, aids and fines were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight service, the king had always ready at his command an army of sixty thousand knights or *milites:* who were bound, upon pain of confiscating their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade, or foreign merchandize, such as it then was, was carried on by the Jews and Lombards; and the very name of an English fleet, which king Edgar had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers or inferior tradesmen, who, from their insignificancy, happily retained, in their socage and burgage tenure, some points of their antient freedom. All the rest were villeins or bondsmen.

[From so complete and well-concerted a scheme of servility, it has been the work of generations for our ancestors to redeem themselves and their posterity into that state of liberty which we now enjoy: which, therefore, is not to be looked upon as consisting of mere encroachments on the Crown, and infringements on the prerogative, as some slavish and narrow-minded writers have endeavoured to maintain: but as, in general, a gradual restoration of that antient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman. How that restoration has in a long series of years been step by step effected, we now proceed to inquire.

William Rufus proceeded on his father's plan; and in some points extended it, particularly with regard to the forest laws. But his brother and successor, Henry the first, found it expedient, when first he came to the crown, to ingratiate himself with the people, by restoring (as our monkish historians tell us) the laws of King Edward the Confessor. The ground whereof is this: that by charter he gave up the great grievances, of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feudal tenures, but reserved the tenures themselves, for the same military purposes that his father introduced them. He also abolished the *curfew* (*h*); for, though it is mentioned in our laws a full century afterwards (*i*), yet it is rather spoken of as a known *time* of night (so denominated from that abrogated usage) than as a still subsisting custom. There is extant a code of laws in his name, consisting partly of those of the Confessor, but with great additions and alterations of his own, and chiefly calculated for the regulation of the county courts. It contains some directions as to crimes and their punishments (that of theft being made capital in his reign), and a few things relating to estates, particularly as to the descent of lands; which, being by

(*h*) Spelm. Cod. LL. W. 1, 288, Hen. 1, 299.

(*i*) Stat. Civ. Lond. 13 Edw. 1.

[the Saxon laws equally to all the sons,—by the feudal or Norman to the eldest only,—King Henry here moderated the difference; directing the eldest son to have only the principal estate, "*primum patris feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots; reserving, however, these ensigns of patronage,—*congé d'eslire*, custody of the temporalties when vacant, and homage upon their restitution. He, lastly, united again for a time the civil and ecclesiastical courts; which union was soon dissolved by his Norman clergy: and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time: from whence we may easily perceive how far short this was of a thorough restitution of King Edward's or the Saxon laws.

The usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign, however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

By the time of King Henry the second, if not earlier, the charter of Henry the first seems to have been forgotten; for we find the claim of marriage, ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived; being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However, in this prince's reign, much was done to methodize the laws, and reduce them into a regular order, as appears from that excellent treatise of Glanvil: which, though some of it be now antiquated and altered, yet, when compared with the

[code of Henry the first, it carries a manifest superiority (*k*). Throughout his reign, also, was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the first: when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the reign of Henry the second, now under consideration, there are four things which peculiarly merit the attention of a legal antiquary: 1. The constitution of the parliament at Clarendon, A.D. 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from their secular jurisdiction; though his further progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices of eyre, *in itinere;* the king having divided the kingdom into six circuits] (a division but little different from the present), [and commissioned these new created judges to administer justice, and try writs of assize, in the several counties. These remedies are said to have been then first invented: before which, all causes were usually terminated in the county courts, according to the Saxon custom; or before the king's justiciaries in the *aula regis,* in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establish-

(*k*) Hale, Hist. C. L. 138.

[ment of the grand assize, or trial by special kind of jury, in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battel. 4. To this time must also be referred the introduction of escuage, or pecuniary commutation for personal military service; which in process of time was the parent of the antient subsidies granted to the Crown by parliament, and the land-tax of later times.

Richard the first, a brave and magnanimous prince, was a sportsman as well as a soldier; and therefore enforced the forest laws with some rigour, which occasioned many discontents among his people; though (according to Matthew Paris) he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting; probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron, which are still extant, and of high authority; for in his time we began again to discover that (as an island) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the justices in eyre; the king's thoughts being chiefly taken up by the knight errantry of a croisade against the Saracens in the holy land.

In King John's time, and that of his son, Henry the third, the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories; which, at last, had this effect, that, first, King John, and afterwards his son, consented to the two famous charters of English liberties, *Magna Charta* and *Charta de Foresta*. Of these the latter was well calculated to redress many grievances and encroachments of the Crown in the exertion of forest law; and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time: though now, un-

[less considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses or other process for debts or services due to the Crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the law relative to the forfeiture of lands for felony, and prohibited for the future the grants of exclusive fisheries, and the erection of new bridges, so as to oppress the neighbourhood. With respect to private rights, it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it regulated the law of dower; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern, it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant strangers; and forbade the alienation of lands in mortmain. With regard to the administration of justice, besides prohibiting all denials or delays of it, it fixed the Court of Common Pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and, at the same time, brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits: it also corrected some abuses then incident to the trials by wager of law and of battel; directed the regular awarding of inquests for life or member; prohibited the king's inferior ministers from holding pleas of the Crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county-court, sheriff's tourn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the king-

[dom. And, lastly, (which alone would have merited the title that it bears of the *great* charter,) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land (*l*).

However, by means of these struggles the pope, in the reign of King John, gained a still greater ascendant here than he ever had before enjoyed, which continued through the long reign of his son, Henry the third, in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may, by this time, perceive in Bracton's treatise a still further improvement in the method and regularity of the common law, especially in the point of pleadings (*m*). Nor must it be forgotten, that the first traces which remain of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of King John, though omitted in that of Henry the third; and that towards the end of the latter of these reigns we find the first record of any writ for summoning knights, citizens, and burgesses to parliament. And here we conclude the second period of our English legal history.

III. The third commences with the reign of Edward the first, who hath justly been styled our English Justinian. For in his time the law did receive so sudden a perfection, that Sir Matthew Hale does not scruple to affirm (*n*), that more was done in the first thirteen years of his reign, to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together.

(*l*) The following is the celebrated 29th chapter of *Magna Charta*, the foundation of the liberty of Englishmen: "*Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur de libero tenemento suo, vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.*"

(*m*) Hale, Hist. C. L. 156.

(*n*) Ibid. 158.

[It would be endless to enumerate all the particulars of these regulations; but the principal may be reduced under the following general heads. 1. He established, confirmed and settled the great charter and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction; and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction,—those of the king's bench, common pleas, and exchequer,—so as they might not interfere with each other's proper business; to do which they were afterwards obliged to have recourse to fictions. 4. He settled the boundaries of the inferior courts in counties, hundreds, and manors, confining them to causes of no great amount, according to their primitive institution; though of considerably greater than, by the alteration of the value of money, they were afterwards permitted to determine (*o*). 5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages levied without consent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities and effect of fines levied in the Court of Common Pleas, though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom, few of which are more antient than the reign of his father, and those were by him collected. 9. He improved upon the laws of King Alfred, by the great and orderly method of watch and ward for preserving the public peace and preventing robberies, established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of

(*o*) As to the jurisdiction of the *modern* County Courts, vide sup. vol. III. p. 377.

[landed property, by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution not only upon goods and chattels, but also upon lands, by writ of *elegit*; which was of signal benefit to a trading people; and upon the same commercial ideas, he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade,—contrary to all feudal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law was extremely deficient. 13. He also effectually closed the great gulph in which all the landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. 14. He established a new limitation of property by the creation of estates tail, concerning the good policy of which, however,] in the strict shape at least that originally belonged to them, [modern times have entertained a very different opinion. 15. He reduced all Wales to the subjection not only of the Crown, but, in great measure, of the laws of England] (an improvement which has been since thoroughly completed); [and seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

This catalogue might be continued much further: but, upon the whole, we may observe, that the very scheme and model of the administration of common justice between party and party was entirely settled by this king (*p*); and has continued nearly the same, in all succeeding ages, to this day; abating some few alterations, which the humour or necessity of subsequent times hath occasioned. The forms of writs, by which actions are commenced, were perfected in his reign, and established as models for posterity. The pleadings, consequent upon the writs, were then

(*p*) Hale, Hist. C. L. 162.

[short, nervous, and perspicuous; not intricate, verbose, and formal. The legal treatises, written in his time, as Britton, Fleta, Hengham (*q*), and the rest, are, for the most part, law at this day; or at least *were* so, till the alteration of tenures took place. And, to conclude, it is from this period, from the exact *observation* of *Magna Charta*, rather than from its *making* or *renewal*, in the days of his grandfather and father, that the liberty of Englishmen began again to rear its head; though the weight of the military tenures hung heavy upon it for many ages after.

A better proof cannot be given of the excellence of his constitutions, than that from his time to that of Henry the eighth there happened very few, and those not very considerable, alterations in the legal *forms* of proceedings. As to matter of *substance:* the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns of Edward the second and Edward the third; and justices of the peace were established instead of the latter. In the reign also of Edward the third the parliament is supposed most probably to have assumed its present form; by a separation of the Commons from the Lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings, from French into Latin, another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general; for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the security of his mercantile

(*q*) As to these, see Reeves's Hist. Eng. L. vol. ii. p. 280, &c.

[debts. And, as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law; to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *præmunire*, for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century: though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution, introduced into the laws of the land by the influence of the regular clergy.

From this time to that of Henry the seventh, the civil wars and disputed titles to the crown gave no leisure for further juridical improvement: "*nam silent leges inter arma.*" And yet it is to these very disputes that we owe the happy loss of all the dominions of the Crown on the continent of France; which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise we owe the method of barring entails by the fiction of *common recoveries*, invented originally by the clergy, to evade the statutes of mortmain, but introduced under Edward the fourth, for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of *uses*, another of the clerical inventions.

In the reign of King Henry the seventh, his ministers, not to say the king himself, were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing

[character of this reign was, that of amassing treasure in the king's coffers, by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this, and this only, for their great and immediate object. To this end the Court of Star Chamber was new modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to alien. The benefit of clergy, which so often intervened to stop attainders and save the inheritance, was now allowed only once to lay offenders, who only could have inheritances to lose. A writ of *capias* was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry his goods became the property of the Crown. In short, there is hardly a statute in this reign, introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of our legal history, viz. the reformation of religion, under Henry the eighth, and his children; which opens an entirely new scene in ecclesiastical matters; the usurped power of the pope being now for ever routed and destroyed, all his connexions with this island cut off, the Crown restored to its supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in the king. And, had the spiritual courts been at this time reunited to the civil, we should have seen the old Saxon constitution, with regard to *ecclesiastical* polity, completely restored.

[With regard also to our *civil* polity, the statute of wills and the statute of uses, both passed in the reign of this prince, made a great alteration as to property: the former by allowing the *devise* of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of *uses*, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense; which, however arbitrarily exercised or productive of jealousies in its infancy, has at length been matured into a system of rational jurisprudence; the principles of which, notwithstanding they may differ in forms, are now equally adopted by the courts of both law and equity. From the statute of uses, and another statute of the same antiquity, which protected estates for years from being destroyed by the reversioner, a remarkable alteration took place in the mode of conveyancing: the antient assurance by feoffment and livery upon the land being thenceforth very seldom practised, since the more easy and more private invention of transferring property by secret conveyances to uses,—and long terms of years being now continually created in mortgages and family settlements, which might be moulded to a thousand useful purposes by the ingenuity of an able artist.

The further attacks in this reign upon the immunity of estates tail, which reduced them to little more than the conditional fees at the common law before the passing of the statute *De donis*; the establishment of recognizances in the nature of a statute staple, for facilitating the raising of money upon landed security, and the introduction of the bankrupt laws, as well for the punishment of the fraudulent, as the relief of the unfortunate, trader; all these were capital alterations of our legal polity, and highly convenient to that character, which the English began now to reassume, of a great commercial people. The incorporation

[of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy; and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry the eighth a very distinguished era in the annals of juridical history.

It must be however remarked, that, particularly in his later years, the royal prerogative was strained to a very tyrannical and oppressive height; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments, one of which, to its eternal disgrace, passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and newfangled treasons, which were slightly touched upon in a former chapter. Happily for the nation this arbitrary reign was succeeded by the minority of an amiable prince, during the short sunshine of which great part of these extravagant laws were repealed. And to do justice to the shorter reign of Queen Mary, many salutary and popular laws, in civil matters, were made under her administration, perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery: the well-concerted schemes for effecting which were, through the providence of God, defeated by the seasonable accession of Queen Elizabeth.

The religious liberties of the nation being, by that happy event, established (we trust) on an eternal basis, though obliged in their infancy to be guarded, against papists and other nonconformists, by laws of too sanguinary a nature: the forest laws having fallen into disuse; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the institutions of

[King Edward the first, without any material innovations; all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements; except only in the continuation of the military tenures, and a few other points, which still armed the Crown with a very oppressive and dangerous prerogative. It is also to be remarked, that the spirit of enriching the clergy and endowing religious houses had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the *restraining* statutes, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of Queen Elizabeth, more humane and beneficial than even the feeding and clothing of millions; by affording them the means, with proper industry, to feed and to clothe themselves. And, the further any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

However, considering the reign of Queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations in the English constitution. For, though in general she was a wise and excellent princess, and loved her people; though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home; yet the increase of the power of the Star Chamber, and the erection of the High Commission Court in matters ecclesiastical, were the work of her reign. She also kept her parliaments at a very awful distance; and in many particulars she, at times, would carry the prerogative as

[high as her most arbitrary predecessors. It is true, she very seldom exerted this prerogative, so as to oppress individuals; but still she had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to show, that these were not those golden days of genuine liberty that we formerly were taught to believe; for surely the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power, of the sovereign.

The great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet sure degrees, for as great a revolution in government: yet while that revolution was effecting, the Crown became more arbitrary than ever, by the progress of those very means which afterwards reduced its power.

It is obvious to every observer, that till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth, before the extension of trade, was comparatively small; and the nature of their landed property was such as kept them in continual dependence upon their feudal lord, being usually some powerful baron, some opulent abbey, or sometimes the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals were little regarded or thought of; nay, even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler, which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments, of a Sidney, a Locke

[and a Milton. But when learning, by the invention of printing and the progress of religious reformation, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass and the consequent discovery of the Indies: the minds of men, thus enlightened by science and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative (the nobility and clergy), were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury (which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves), and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenses; to gratify which they were permitted, by the policy of the times, to dissipate their overgrown estates and alienate their antient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the spoil of the monasteries and the great increase of the customs, grew rich, independent, and haughty: and the commons were not yet sensible of the strength they had acquired, nor urged to examine its extent by new burthens or oppressive taxations, during the sudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamed of opposing the prerogative to which they had been so little accustomed; much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were, therefore, the times of the greatest despotism that have been

[known in this island since the death of William the Norman: the prerogative, as it then stood by common law, and much more when extended by Act of Parliament, being too large to be endured in a land of liberty.

Queen Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as their father King Henry the eighth. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the Queen of Scots, occasioned greater caution in her conduct. She, probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore drew a veil over the odious part of the prerogative; which was never wantonly thrown aside, but only to answer some important purpose: and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely, for the space of half a century together, reign in the affections of the people.

On the accession of King James the first, no new degree of royal power was added to, or exercised by him: but such a sceptre was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit subversive of liberty and property, and all the natural rights of humanity. They examined into the

[divinity of this claim, and found it weakly and fallaciously supported: and common reason assured them, that, if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability, as well as inclination, to resist it; and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of concealments, monopolies, and the dispensing power. In the mean time, very little was done for the improvement of private justice except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitation of suits and actions, and the regulating of informations upon penal statutes. For we cannot class the laws against witchcraft and conjuration, under the head of improvements; nor did the dispute between Lord Ellesmere and Sir Edward Coke, concerning the powers of the Court of Chancery, tend much to the advancement of justice.

Again, when Charles the first succeeded to the crown of his father, and attempted to revive some enormities which had been dormant in the reign of King James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that misguided prince's reign; which, though the noon of it began a little to brighten, at last went down in blood, and left the whole kingdom in darkness. It must be acknowledged that, by the Petition of Right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest laws, which the Crown most unseasonably revived. The legal jurisdiction of the Star Chamber and High Commission Courts, was also extremely great; though their usurped authority was still greater. And, if we add to these, the disuse of par-

[liaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors, in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given; for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the Star Chamber and High Commission Courts, for ascertaining the extent of forests and forest laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in consequence of their feudal tenures: though it must be acknowledged that these concessions were not made with so good a grace as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befall a prince: Though he formerly had strained his prerogative not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he had now consented to reduce it to a lower ebb than was consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that this condescension was merely temporary. Flushed, therefore, with the success they had gained, fired with resentment for past oppressions, and dreading the consequences if the king should regain his power, the popular leaders, who in all ages have called themselves the *people*, began to grow insolent and ungovernable; their insolence soon rendered them desperate; and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the Church and monarchy, and proceeded, with deliberate solemnity, to the trial and murder of their sovereign.

[We pass by the crude and abortive schemes for amending the laws, in the times of confusion which followed; the most promising and sensible whereof, such as the establishment of new trials, the abolition of feudal tenures, the Act of navigation, and some others, were adopted in the—

V. Fifth period, which is to be next mentioned, viz. after the restoration of King Charles the second. Immediately upon which, the principal remaining grievance, the doctrine and consequences of military tenures, was taken away and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch in whose person the royal government was restored, and with it our antient constitution, deserves no commendation from posterity, yet in his reign, wicked, sanguinary, and turbulent, as it was, the concurrence of happy circumstances was such, that from thence we may date not only the re-establishment of our Church and monarchy, but also the complete restitution of English liberty, for the first time since its total abolition at the Conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from encumbering the estates of the subject; but also an additional security of his person from imprisonment was obtained, by that great bulwark of our constitution, the *Habeas Corpus* Act. These two statutes, with regard to our property and persons, form a second *Magna Charta*, as beneficial and effectual as that of Running-Mead. That only pruned the luxuriances of the feudal system; but the statute of Charles the second extirpated all its slaveries,—except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interposition of our courts of justice,] and under recent enactments seem to be approaching a final extinction. [*Magna Charta* only, in general terms, declared, that no man shall be imprisoned contrary to law: the

[*Habeas Corpus* Act points him out effectual means, as well to release himself, (though committed even by the king in council,) as to punish all those who shall thus unconstitutionally misuse him.

To this may be added the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the Test and Corporation Acts, passed to secure both our civil and religious liberties,] though afterwards repealed, as no longer suited to the state of the times in which we live; [the abolition of the writ *de hæretico comburendo*; the statute of frauds and perjuries, a great and necessary security to private property; the statute for distribution of intestates' estates; and that of amendments and *jeofails*, which cut off] many of [those superfluous niceties which so long had disgraced our courts; together with many wholesome Acts that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, "that the constitution of England "had arrived to its full vigour, and the true balance "between liberty and prerogative was happily established "by *law*, in the reign of Charles the second."

It is by no means intended to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestable is this, that *by the law* (*r*), as it then stood, notwithstanding some invidious, nay dangerous, branches of the prerogative, have since been lopped off, and the rest more clearly defined, the people had] a larger portion of real liberty than they had

(*r*) Blackstone here subjoins in a note, "The point of time at which I "would choose to fix this *theoretical* "perfection of our public law, is "the year 1679, after the Habeas "Corpus Act was passed, and that "for licensing the press had expired; though the years which immediately followed it, were times "of great *practical* oppression."

enjoyed in this country since the Norman conquest (*s*); [and sufficient power residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative; for which we need but appeal to the memorable catastrophe of the next reign. For when King Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could and did resist him; and, in consequence of such resistance, obliged him to quit his enterprise and his throne together:] which introduces us to the next period of our legal history, viz.—

VI. From the revolution in 1688, to the time of the publication of Blackstone's Commentaries. In this period many laws were passed; [as the Bill of Rights, the Toleration Act, the Act of Settlement with its conditions, the Act for uniting England with Scotland, and some others, which asserted our liberties in more clear and emphatical terms; regulated the succession of the Crown by Parliament, as the exigencies of religious and civil freedom required; confirmed and exemplified the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution; maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal;] indulged tender consciences in several points relating to religion (*t*); [established triennial, since turned into septennial, elections of members to serve in parliament; excluded certain officers from the house of commons; restrained the king's pardon from obstructing parliamentary impeachments; imparted to all the lords an equal right of trying their fellow peers; regulated trials for high treason;

(*s*) Blackstone's expression in this place is,—"as large a portion of "real liberty as is consistent with a "state of society." But the truth of the proposition, carried to this extent, may be doubted; particularly if it be intended to include religious liberty.

(*t*) Blackstone's expression is,—"indulged tender consciences with "every religious liberty consistent "with the safety of the State." At the present day, however, it would perhaps be generally held, that the indulgence fell far short of this limit.

[set bounds to the civil list; placed the administration of that revenue in hands that are accountable to parliament; and made the judges completely independent of the sovereign, his ministers, and his successors. Yet, though these provisions, in appearance and nominally, reduced the strength of the executive power to a much lower ebb than in the preceding period, if, on the other hand, we throw into the opposite scale, (what perhaps the immoderate reduction of the antient prerogative may have rendered in some degree necessary,) the vast acquisition of force arising from the Riot Act, and the annual expedience of a standing army, and the vast acquisition of personal attachment arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest, we shall find that the Crown, gradually and imperceptibly, gained almost as much in influence, as it apparently lost in prerogative.

The chief alterations of moment,—for the time would fail were we to descend to *minutiæ*,—in the administration of private justice during this period, were the solemn recognition of the law of nations with respect to the rights of ambassadors; the cutting off, by the statute for the amendment of the law, a vast number of excrescences, that in process of time had sprung out of the practical part of it; the protection of corporate rights by the improvements in writs of *mandamus* and informations in nature of *quo warranto;* the regulation of trials by jury, and the admitting witnesses for prisoners, upon oath; the further restraints upon alienation of lands in mortmain; the annihilation of the terrible judgment of *peine forte et dure;* the extension of the benefit of clergy, by abolishing the pedantic criterion of reading; the counterbalance to this mercy, by the vast increase of capital punishment; the new and effectual methods for the speedy recovery of rents; the improvements which were made in ejectments for the trying of titles; the introduction and establishment of paper credit, by indorsements upon bills and notes, which have shown

[the legal possibility and convenience, which our ancestors so long doubted, of assigning a *chose in action;* the translation of all legal proceedings into the English language; the erection of courts of conscience for recovering small debts; the establishment of the great system of marine jurisprudence, of which the foundations were laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases:] and, lastly, the enlargement of view which introduced into our courts of common law, in some instances, where narrower doctrines once prevailed, the same principles of redress as were already established in our courts of equity.

VII. During the period of about ninety years which has elapsed since the publication of Blackstone's Commentaries, the most conspicuous event in our legislative annals has been the Act for the union of Great Britain and Ireland, a measure recommended by the wisest and most unquestionable policy, to two nations so nearly connected by their geographical position and their common subjection to the same Crown, and so long already united in language, in civil institutions, and in arms. We may also single out for particular enumeration, the Act to amend the representation of the people, and that to regulate municipal corporations; two statutes of transcendent importance, as having been designed to extinguish, and having in fact materially abated, the indirect influence immemorially exercised by wealth and power, in our general and local institutions.

Of the other measures of importance, those relating to the Church may next attract our attention; and here we may notice the repeal of the Test and Corporation Acts, by which dissenters in general were relieved from all restraints that had before excluded them from free participation with their fellow subjects in political rights; the Catholic Emancipation Act, by which the same benefit

was bestowed on those who profess the faith of the Church of Rome; the many other acts for relief of the same persons from all forfeitures and penalties to which they had before been liable in respect of their religious tenets: the Acts for commutation of tithes; for reform of the law relative to pluralities and residence; for the better application of cathedral revenues; and for the extension of the places of worship belonging to the established Church, and the general increase of her efficiency as regards the cure of souls.

On the merits of many of these measures, indeed, opinions have been much divided, as will always be the case upon questions connected with politics or religion; but a more unmixed applause may reasonably be claimed for the improvements that have been introduced in relation to our social economy,—for the abolition of the slave-trade, and of slavery in the colonies, for the Acts relative to trade and navigation, to banking, to registration, to lunatic asylums, to gaols, to the manner of celebrating marriage, to education, to copyright and patent right, to charitable trusts and benevolent institutions, and to the general relief of the poor.

It is however in regard to the rights of property and the administration of justice, that the genius of reform has latterly displayed its chief activity, and that its achievements have been, upon the whole, the most triumphant. It would be impossible, without a tedious minuteness of detail, to recount the whole of these. But under the first head, our notice is particularly due to the improvements which have taken place in the law of descent or inheritance, of prescription, of dower, and of the limitation of the time for recovering real estate; to the better regulation of wills and testaments; to the deliverance of entails and the estates of married women from the thraldom of expensive and cumbrous forms of conveyance, and the substitution of better methods; to the introduction of greater simplicity and uniformity in several other particulars, and greater

freedom of disposition, into that part of our legal system which relates to the alienation of land; and to the provisions for facilitating the relief of copyhold estates from the burthens of an oppressive tenure, and their conversion into freehold.

Under the reforms in the administration of civil justice may be particularized the better regulation of juries; the abolition of the separate judicature of Wales; the improved arrangement of the Terms, and of the proceedings in error; the abolition of the antiquated forms of real actions, which had survived the lapse of ages only to subserve the purposes of chicanery; the provision for speedy judgment and execution, upon verdicts; the new improvements in the proceedings by ejectment, prohibition, and mandamus; the powers conferred on the courts of common law to grant injunctions against the repetition or continuance of private injuries, to give relief to parties exposed to adverse claims, and to order the examination of witnesses, and of the parties themselves, on interrogatories, and the issuing of commissions for examination of witnesses abroad; the many important and elaborate improvements in the forms of process and pleading, both as regards the courts of common law and of equity; the reformation of the law of evidence: and the establishment of the new courts of bankruptcy and insolvency, of the vice-chancellors and of the lords justices in equity, of the judicial committee of the privy council, of the new county courts, of the court of probate, and of the court for divorce and matrimonial causes.

And, lastly, with respect to the administration of criminal justice, we may refer to the salutary repeal of many antiquated statutes; the consolidation of the law relating to most of the principal offences; the abolition of the benefit of clergy, and of appeals; the better regulation of the law of principal and accessory, of commitment and bail, and of venue; the introduction of a variety of provisions tending to simplify the course of proceeding, and to

deliver it from technical difficulties; the allowance of counsel to address the jury for the prisoner, in cases of felony; and the remarkable mitigation which has generally taken place in the antient severity of our criminal punishments.

[Thus, therefore, for the amusement and instruction of the reader, have been delineated some rude outlines of a plan for the history of our laws and liberties, from their first rise and gradual progress among our British and Saxon ancestors, till their total eclipse at the Norman conquest, from which they have gradually emerged and risen to the perfection they now enjoy, at different periods of time.] It has been shown that the rules of law which regard the *rights* of each member of the community, whether considered in an *individual*, a *relative*, or a *social* capacity, the *private injuries* which may be committed in violation of these rights, and the wrongs which affect the public, or *crimes*, [have been and are every day improving, and are now fraught with the accumulated wisdom of ages;] that the forms of administering justice have also, (particularly in our own times,) received the assiduous care of the cultivators of legal science; and that our religious, civil, and political liberties, so long depressed in popish and arbitrary times, and occasionally threatened with absolute extinction, have since, in a constant course of progressive development, commencing at the happy era of the Revolution, been effectually vindicated and established. [Of a constitution so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise which is justly and severely its due; the thorough and attentive contemplation of it, will furnish its best panegyric.]

The admiration that it is calculated to inspire should lead to some reflection on the duties which attach to citizens born to so noble an inheritance. It was the stern task of our forefathers to struggle against the tyrannical pretensions of regal power: to us, the course of events appears to have assigned the opposite care, of holding in

check, the aggressions of popular licence, and maintaining inviolate the just claims of the prerogative. But, in a general view, we have only to pursue the same path that has been trodden before us,—to carry on the great work of securing to each individual of the community, as large a portion of his natural freedom as is consistent with the organization of society, and to increase, to the highest degree that the order of divine Providence permits, the benefits of his civil condition. A clearer perception of the true nature of this enterprize, of the vast results to which it tends, and of the obligations by which we are bound to its advancement, has been bestowed on the present generation, than on any of its predecessors. May it not fail also to recollect, amidst the zeal inspired by such considerations, that the desire for social improvement degenerates, if not duly regulated, into a mere thirst for change;—that the fluctuation of the law, is itself a considerable evil;—and that, however important may be the redress of its defects, we have a still dearer interest in the conservation of its existing excellencies.

END OF THE WORK.

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